Charles Adams

Litchfield, July 1812

Lectures

on

Law

By

Hon. Tapping Reeve

and

James Gould Esq.

Litchfield, Connecticut.

August 4th 1812

this certifies that Charles Adams read law under our direction in our office and attended the lectures there given, from the 13th of June 1812 to the 4th of August 1812

Tapping Reeve in behalf of
James Gould Esquire and himself

Municipal Law.

By

James Gould Esq.

Municipal Law

Lecture 1st.

Municipal Law denotes the law of a body politic, but by the English Lawyers is defined to be "a rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong." It is uniform and universal as far as it extends. It differs from natural law, for the latter "considers men in their individual capacity." 1 Blacks. C. 44

— It must be prescribed. — A retro-active law is not always an ex-post-facto-Law. An ex-post-facto Law is a retro-active penal law. Ex post facto laws respect offences merely. Two kinds of retro-active laws prohibited by the Constitution, mentioned in

1 Blacks. C. 46
do. —
3 Dallas. 386
391.

Every retroactive law is a genus of which an ex post facto is a species. By a retroactive law is meant a law which in its operation affects a transaction that was made before the law was in existence.

An ex post facto Law, is a law made after an action is committed to inflict a punishment on a person who was innocent at the time the action was committed, but made criminal by a subsequent law. An Ex post facto law is always a penal law. This definition was settled by the Supreme Court of the U.S. in the case of

Buller vs. Calder

Or a retroactive law is not prescribed

Constitution
U.S. art. 1.
Section 10.

Municipal Law

it seems as tho' it would be void but
the Supm. Court U.S. determined it was
good & constitutional.

Consuetudo est communis Lex. Cro. Eliz. 10 — The words in a law are to be understood
generally according to their most known
acceptation. So also with terms of Art.
If terms of C.L. are used in a statute
they are to be understood according to
4. Bl. C. 59-60. — their use at C.L. When the words are
4. Bac. 647- — doubtful you must refer to the preamble
5 Mod. 143- — and to the context to aid in the true construction.
Ld. Raym. 1028- 1 Bl. C. 60 Plow. 206. 1 Vesey 365. — If several laws are contradictory
the rule then is to compare them.
1. Bl. C. 16. 61 — The words are to be understood as having reference
4. Bac. 652- — to the subject matter of the Statute.
Of two constructions, that which is the
most just & reasonable is to be preferred.
The reason & principle of the rule
is principally to govern in the construction
of the same. Hence arises what is
Plow. 232. 1. Bl. C. 62. 612. 3. B. C. 341. 431. — called the equity of the law i.e. such
a construction as is agreeable to the reason
& spirit of the law. It is divided
into the *Lex scripta* & the *Lex non scripta*
1. B. C. 63— — The former includes Common Law or general
customs — 2d Particular Customs —
3d Particular laws which prevail in different
districts. They are called *customary laws*,
a Court of Eq. cannot have a different rule of construction from a court of Law but merely regulates the construction. — because they derive their authority
1. B. C. 64. 67. 74. — from immemorial usage. According
to theory the Common Law must extend
beyond legal memory (i.e.) the accession
1. B. C. 68. 26. 31- — of Richard 1st abt 1200.

Municipal Law

This is mere theory for the fact is con- 2. Inst. 238.9.
trary. Law is to be found in the records, 2. Roll. 260.
of the Courts Reports and the writings of
the learned in Law. Judicial decisions 1. Bl. C. 63
do not *per se* constitute the Common Law, 70. 71.
only evidence of the same. *Precedent*, is
a former decision upon the same point in
question, & is consequently mere evidence,
and is not to be overturned when the
reason is not manifest, for the *onus* 1 B. C. 69. 70
probandi falls upon the other party. 10 East. 495.
They must be proved to be unreasonable be-
fore they can be set aside. For, *ita lex*
scripta (says Buller) *stare decisis*.
The *unwritten* law is a customary law
but according to the preceding section
the unwritten law & the Common Law are
not the same. The Common Law is a
branch of the unwritten law, for par-
ticular customs which are a branch of the
unwritten Law, are not the Common Law.
It is called unwritten Law because in its
original constitution it is not set down
in writing, their being no written or gen- 1. B. C. 64 –
eral memorial of it, which can be 67.
called a Law. It derives all its force
from custom. (The first branch of the *un-*
written law is the Common Law. all
unwritten law is customary Law: The
Common Law, is therefore a Law found-
ed on long & immemorial usages. It is
called a General Custom. It is called
Common because it is common to the

whole state or Kingdom - the Common Law depends for its authority & support on immemorial usage. By immemorial usage is meant an universal reception. It is said that no custom general, or particular is good, if it has not existed as early as the reign of Richard 1st. This is mere theory, for the fact is a great part has been made since that period. But as the original constitution of the Common Law was not set down in writing, it may be asked where is it to be found? It is answered, as before observed, in the records of the courts of Justice &c. An act of Parliament is Law per se. The most authentick treatises of learned men are not precedents. So a mere opinion of a Judge on a Bench is no precedent. The treatises & opinions, however

1 East. 155.
1 B.C. 69

are prima facie evidence of what is the Law. This customary Law was actually enacted & built up by the Courts of Justice, & the Judges of the Courts of Westminster Hall. If there is no unwritten Law, there can be no such thing as a regular settlement of Jurisprudence. If the Common Law was created by the Courts of Justice it would seem that it did not come within the definition of Municipal Law, of which the Common Law is a branch, because it must be prescribed by the Supreme power. But to this it may be answered, that the Supreme Power does acquiesce in it, and when any law is sanctioned by the acquiescence of the legislature it is sanctioned as Law. New rules of Common Law are not law, but evidence of what the law has been, & hence decisions are evidence of immemorial custom. Entire branches of the common or unwritten Law, have been reared up since the accession of Richard 1st. as the Common Law introduced by Lord Hardwicke respecting Paraphernalia — the Law Merchant built up and matured by Lord Mansfield — How then can they be said to be of immemorial usage? Ans. The decisions being merely the evidence of what the Common Law was and not the Common Law itself it is presumed the law has existed in the breasts of the Judges time out of mind. —

¶ The second branch of Municipal Law consists of particular customs — The difference between this & the Common Law is explained in or by the terms themselves — A particular custom is a local usage. This is called particular because it extends only to the inhabitants of some particular province or district — And this is the essential difference between the Common Law & Particular customs as to their general nature. — 1. B.C. 74. 2. Do. 253 —

Municipal Law.

But there are several rules which relate to particular customs only 1st. It is a general rule that particular customs must be pleaded specially as a matter of fact, and the existence of the custom must always be shown and then that this case comes within the custom. And as particular customs are to be specially pleaded, so they are to be tried as matter of fact by jury. But if the same custom has been tried and decided by the same courts, it is not to be tried again — the judges are presumed to know it. — It is a general rule of law that whenever there is an immemorial usage the Court must presume every thing possible which would give it a legal origin. By the civil law, ten years make a custom.

The legality of a particular custom must be proved for "Malus usus abolendus est" is an established maxim of Law 1. B.C. 76.

Doug. 132.

1 Brown & Admlty Law 247

There are two particular customs which do not come within this† rule. These are the customs of *Gavelkind* & *Borough English*. These need not be specially pleaded. Justice Blackstone includes the *Lex Mercatoria*, Mr Gould thinks improperly because the Law Merchant is not a local usage but governs particular transactions within the realm. But it is not confined to local limits — it is a branch of Common Law. That it is not a particular custom appears, *first*, Because it need not be specially pleaded, 2dly The Lex Mercatoria is not tried by a jury but particular customs — When

Lecture 2d

† Reference is had two or three sentences back.

Co. Litt. 175. 75.
1. B.C. 76. Litt. Text Sec. 265.
1. B.C. 75
2 B.C. 459

Salk. 125.)

Municipal Law. —

It is said that merchants may be examined as to the existence of customs, all that is meant by it is, that they may inform the Judge just in the same manner as he would consult a dictionary to find the meaning of some particular word. As to the qualities of a custom or the requisites to make a good custom 1st That it be immemorial — 2d Continued or uninterrupted — 3d It must be peaceable or immemorially acquiesced in — 4th. It must be a reasonable custom, or rather it must not be an unreasonable custom — 5th. It must be Certain — 6th It must be compulsory —, 7th all customs must be consistent with each other. It is a general rule that customs in derogation of the Common Law are construed strictly, i.e. they cannot be extended by analogy or construction — In England all customs must submit to the Royal Prerogative —

The third class of particular customs or laws are those adopted by custom or used only by particular courts — These particular laws are the civil or canon Laws — These laws are binding in England by adoption. They are not binding on account of any original intrinsick authority. The Common & Statute Laws of England, so far as they are binding in this country, derive their authority from a similar source i.e. sanction, adoption or usage, except

4 T. Rep. 205
2 Chitty 13. 25. 160
Doug. 72. 65 B.
Ld Raym. 175
3 B. L. 436. 37.

1 B. C. 76 to 8. l. c. 55
1 Inst. 113. 114 —

e.g. an infant can under the custom of gavelkind convey in fee, but in no other way.

1 B. C. 75 .. 79 —
1. B. C. 79 — 1 Inst. 15.

1. B. C. 67 .. 79 — 80 to 83.

The Common Law was not originally binding here.

Municipal Law

cases where a Statute of England is adopted by a Statute of any of the U. States— The +reason why this ought to be considered thus is, that in general it has been adopted & acted upon as our Law by usage and common consent— It is clear that our courts ought not to neglect the Common Law of England, only in those cases where it is unjust absurd or inapplicable to our country, i.e. The Common Law of England is, prima facie, the Common Law of the United States. —

+ This sentence has reference to that which follows it, & ought to have been subsequent to it.

It is not pretended that all the Common Law of England is or ought to be adopted in this Country, because all those rules which arise from the Royal Prerogative, cannot obtain in this Country from the nature of the thing. But all that is meant, is that the Common Law of England ought to be observed here, except where it is unjust, absurd, or inapplicable to our situation— It has been made a question whether a Common Law distinct from the Common Law of England can exist in any one or all of the U. States, or in other words whether we can have unwritten rules unknown to the Common Law of England &c.— The objection against the binding force of our judicial decisions was that they were not supported by immemorial usage. So far as the Common Law of England is not applicable to our Country our Courts are bound to reject it. Now it is perfectly clear that every foreign State must have a customary law of its own

Mr. Gould thinks there never was a society in existence that had not an unwritten Law, & he believes there never will exist one without it, for it would be impossible to procure in administering justice. —

Municipal Law.

If we had a common law, it must be without any reference to the positive rule which the English have established concerning the reign of Richard I, (and this) rule says Mr Gould, is inapplicable to this country. All our customs are deemed as old as our government; and as formerly in England a custom 60 years old was good, upon this ground we have a common Law of our own, for our government is more than sixty years standing.

1 Bl. 88.106.8 –
8 Co. 20. Tucker's
Blks 1. 391 to 393
Salk. 20 –

The second branch of the municipal law is the lex scripta, by which is meant the Statute law or Acts of Parliament. The ancient Statute laws of England are said to be binding in this Country as far as the Common Law, i.e. that is, they are prima facie the laws of this country, so far as they are not absurd or inapplicable to this Country. The reason why they are so considered is, that when our ancestors settled in this country they brought over as their birthright so much of the laws, both Stat. & Common law, as were then extant – No person contends that these statutes are absolutely binding, but that it was right for them to have that law so far as it was applicable to their situation. – The English Books all agree as to this, that these Statutes were the laws of the Colonies. No persons claims that modern English Statutes have any force here but that ancient Statutes are prima facie the Laws

1. Tuck.s Bl. 385
Salk. 416. 666 –

laws of this country. The greatest portion of the English statutes nevertheless have been adopted in this country — Many we have adopted of course — our Courts of justice have adopted them, so that what in England is written law may here be customary law. So actions on the case & costs are unknown to the Common Law. They were created by a Statute in England & adopted here of course. —

1.B.C.85.6 All Statutes are either public or private or as it is sometimes expressed, General or special. A public statute is defined to be one which regards the whole community — a private statute one which regards private conduct or particular persons. But the application of this distinction is attended with much & frequent difficulty. This definition is by no means a perfect one, but perhaps as good an one as can be given — Most public statutes do regard the whole community, as the statute of frauds & perjuries & of limitations consequently there is no difficulty there. But in many cases statutes relating to particular, & in the terms of them, to classes of men are considered as publick Statutes — The rule of discrimination seems to be this — If the class of persons to whom the Statute immediately relates amounts (as Coke says) to a genus, 'tis a public one but if it amounts only to a species it is a private one — Yet it sometimes happens that a genus may only be a species of a higher genus &, in which case

Municipal Law

case the rule is — if the class of persons contemplated by the Statute admits of a subdivision into species, it is a public Statute — But if it admits of subdivision into individuals only, it is a private one — So a statute made relating to all mechanics, is a public statute, for the term mechanics is a genus consisting of subordinate species — But if the statute relates to all shoe-makers, it is a private one, for this does not admit of a subdivision into species — Again — all statutes qualifying persons to serve, as public Officers, are public — But if concerning Sheriffs only it is private — In England, every statute which concerns the King is a public Statute of course and every statute concerning the public Revenue, is a public statute — The rule of law is that of public or general statutes Judges ought to take notice though they be not pleaded — secus of special or particular statutes which the Judges are not bound to take cognizance of unless specially pleaded — But every act, although the matter thereof concerns individuals, yet if it touches the King, the Judges are bound ex officio to take cognizance — Hence too a statute giving a forfeiture to the King is a public statute though it regards a species of persons only — the general rule is the same in our — So when a forfeiture is given to the State treasury — quia supra.

Skinner 429.
4 Bac. 641 —

12 mod. 249
613. Plow. 65
10 Co. 57. —

Municipal Law

A Statute may be partly public &
4. Bac. 540 partly private, the one part to be treated
as a public the other as a private Law.
Statutes are again divided into such as
are declaratory of the Common Law, &
such as are remedial of it. A declaratory
statute is one that declares & promulgates
what the Common Law is & what
it has been. Hence declaratory statutes
do not make laws but promulgate
those which are already made. Re-
medial Statutes always introduce a
new rule of Law, & this is either by sup-
plying some deficiencies in the Common
Law or abridging its superfluities.
A remedial statute therefore abrogates
+ of Connecticut some rule. + Our statute of the limitation
of lands is an the example of the de-
claratory statute. Statutes are gen-
erally remedial, as Statute of Frauds
1 B. C. 86 & Perjuries.

Again, all Statutes are either Penal
or remedial i.e. beneficial, which
is the most proper word to be used,
though the word Remedial is here
used in a different sense from what
it was in the last division of statutes,
being here used as contra distinguished
from the word Penal. A Statute
inflicting a penalty or punishment of
any kind is penal. The word Penal
in its most extensive signification is
4. Bac 405 synonymous with the word punish-
4 Burrow 450 ment. But is now used in a more
Cross. 414–15. limited sense, meaning a mulct,
forfeiture or amercement. There are
statutes which operate as penal statutes,

but are not treated as such. All statutes, in strictness that give higher remedies than natural justice requires, operate as penal statutes but are not considered as such. All statutes, therefore, which are not penal are beneficial or remedial. Statutes recovering costs are penal. Costs are unknown to the Common Law. They were introduced by the stat. Gloucester 6. Edwd I. And here costs are considered as a punishment by those who pay them.

Action on Stat. Com. Dig. Tit. A 1.
Salk. 212.
1. Wils. 125. 126
Cro. James 414
4 Bac. 650
1 Wils 156. 125-6
3 Co. 67. 7. T. R. 259
2 Inst. 285. Salk. 205.
Comb. 100
(Salk. 206.)
1. Bac. 511. 4 Mod. 7.

But though statutes inflicting any penalty of any kind are penal statutes, yet it does not follow that a prosecution to recover the penalty is a penal action. The Statute is penal but the action is civil. Debt is the proper action to recover a penalty. The form of the action is to determine whether it is civil or penal. This distinction is very important, for a penal action is not within the statute of jeofails; consequently the pleadings in a criminal case cannot be amended, nor can deposition be read in Court. Just so in civil actions. No testimony but such as is under oath, will be admitted in a penal action, consequently the affirmation of a Quaker is inadmissible in penal actions. Secus in civil.

4 Bac. 651.
Cowp 382 Sondward

4 T. R. 753
7 Do. 257
1 Wils 125
Cowp. 282. 391

Lastly Statutes are divided into affirmative & negative statutes. Affirmative statutes are those which are couched in affirmative terms. Negative

Municipal Law

alive those that are in negative terms. This distinction is important only as it respects the construction of affirmative & negative Statutes.

1. Blks. 80 —
4 Bac. 641
2 Inst. 200.
Lectu. &c

It is a rule of the English Law, that all Statutes go into operation the first day of that Parliament in which they are enacted, unless secus provided. It being a fiction that the whole sessions amount to but one day. Hence many Statutes have a retroactive & an ex post facto operation. However, it is now usual to mention in the statute the time when it shall go into operation. & from this it follows, that of two affirmative Statutes made on the same subject & during the same session of Parliament, neither of them has priority. Yet, if they are completely repugnant, it is held that neither, can take effect. But the authority just cited — 6. mod. 287. supports the last statute. This rule presupposes that no time is appointed for the Statute to take effect. This rule of the English Law has always been exploded in Con. Statutes there do not take effect till a reasonable time has elapsed after their creation. And the rule of law is now that no statute shall have effect until the close of that session of the Legislature in which it was enacted, and till the Representatives have time to return home. This is a general rule.

Hobb. 111. 222
309. Ld. R. 371.
1 Tidd 310

19 Vin. Abridg. 520
1 Jones 22. 4 Bac. 636—638.
6. mod. 287.

Municipal Law

Of the Construction of Statutes.

Construction is that process by which
the mind ascertains the meaning
of the language used, to discover the
Law – the maker's will – & that is the
law itself – In the construction of rem-
edial Statutes three points are to be
1 B.C. 87–88– considered: 1st The old law – 2d The
3 Co. 76–78– mischief – 3d The remedy. The particu-
Plow. 17– lar rules of construction have been
given already, & all these rules are
to be observed in the construction of
all Statute Laws – But though these rules
are to be observed, yet Penal Statutes
Plow. 17. 3 Co. 78 are to be construed strictly, i.e. ac-
4 Bac 651– cording to the letter of them, and
8 mod. 65. not according to the spirit. This rule
is not well expressed nor well explain-
ed – it operates on one side only –
The meaning of the rule is that penal
statutes are to be construed as strictly
against the prisoner as liberally for him. The
rule is then favourable to the prisoner
Plow. 17– altogether. i.e. no person shall be ad-
1 B.C. 88 3 Co. 7.8. judged guilty unless he is within the letter
Leaches C. Cas. of it – however strictly so he may be
170–70. 295. within the spirit – So if he is not with-
in the letter he is not within the Statute.
And on the other hand, though a
party is within the letter of it, he
shall not be considered so unless he
1. Hawk. 53. 16. 116. be within the reason & spirit of it like-
131. 138–9. wise – The rule then is this a Judge
4 Burr. 651. may resort to the spirit & reason of the Law

law to take a party out of its penalty, but he cannot resort to its spirit & reason to bring a man within its penalty. It is a general rule that any universality of expression in a penal statute shall not include those who are generally exempted by legal disability, unless expressly specified. ——

Leachs Crown
Cases 170. 295
233. 1. 70.
310. 384.

Plow. 465. Burr.
689. 1 Hawk. 147
283. 19 Vin.
501.

A statute inflicts such & such penalties on all who shall do such & such acts, yet in some cases madmen, femmes covert are not within the statute. So if the Statute inflicts a penalty on any person who shall let blood in the street, a surgeon who bleeds a man in the street is not within the statute. In the construction of Statutes whether penal or not, Lord Kenyon says the intention of the Legislator should govern. If a statute for the repetition of an offence inflicts an additional penalty, the offender is not liable to the additional punishment until he has been tried & convicted of the first offence. To subject the prisoner to the accumulative punishment he must have committed the second offence after he has been convicted of the first. Mr Gould thinks this proceeding too far & giving too liberal construction. The rule of strict construction of penal statutes against prisoners is not uniformly observed. Thus by Stat. 1st Edw. IIII killing

4 T. R. 3.

1 Root 52. 163
1 Hawk. 168
Plow. 465. 486
4 Bac. 651.
1 Hal. 324. 570
685. Smed. 65
4 T. R. 3.

the master is made Petit treason
though killing the Husband by the wife,
or mistress when there is no master
Cro. Chs. 71. 4 Bac. is not mentioned. Yet they are intend-
651. Plow. 86. ed & are by construction Petit Treason.
And so in one or two other cases.
But Mr Gould thinks the intention
of the Legislature should be carried
into Effect in criminal as well as civ-
4 T. Rep. 3. il cases.

Penal laws of one country cannot
be taken notice of in another, so as to
1 H. Blk. 123 have any effect as to the prisoners. These
or 3 T. R. 733. laws are local not transitory. But
Kirby 38. 79. 80 the rule is that the Lex loci should
govern as to civil actions. The rule
of law penal laws of one country can-
not be taken notice of in another &c,
was recognized in the case of Kellog
vs Baldwin though it was overruled
Day's Cases by the Court of Errors, not with a view
in Error 4. however to explode the doctrine.

The Penal laws of every country ex-
tend through the jurisdiction of that
country & are the rule to all persons
within the same, whether foreigner, stran-
Kirby 38. 79. 80. ger, alien or otherwise. In Con. they are
in the Habit of trying, convicting
& punishing every man who should
steal a Horse in New York & bring
it into Con. & then be apprehended.
This is clearly contrary to the Common
Law for a Court in Con. cannot take
notice of the Penal Laws of N.Y. &
consequently cannot know any
thing

thing judicially, whether it was
theft or not. Such a law Mr.
Gould considers manifestly unjust
for as the case may be, theft may
be punished in New York by imprison-
ment, but in Con. by Death. It
was decided contrary in the U.S.
Circuit Court in the time of Judge
Patterson; U.S. vs Huggins. —
When the penalty is continually
incurred by the continuance of an
offence, as in continuing a Nuisance
only one penalty can be sued for Peakes Rep 52
& recovered at a time. Decisions
of the Courts in Con. have given but
one penalty where it was frequently 2. Swift 280
incurred. — 1. Root 526
Beneficial or Remedial Statutes — these
are to be construed liberally or rather 3 Bl. 430
equitably, in the construction of which 3 Co. 7. Plow. 365
the letter may be enlarged or restrain- 465. 1 Co. 123
ed to effectuate the intention of the 11 &c 71 — Pow.
Legislature — So as to include cases not 2. 140-1 —
within the letter & take out such as
are within the letter. Thus — a law
relating to Executors may be so ex-
tended as to include Administra-
tors also, when the reason is the same.
Again the Statute of Henry VIII au-
thorizes all persons to devise, yet by Dyer 357
construction, infants, lunatics &c&c
were excluded. — It is settled that
a statute taking away a common
law remedy is to be construed strict-
ly, for the rights of individuals are
not to be taken away by construction.
Thus

Thus the Statute of Limitations taking
away a C. L. remedy is to be constru-
ed strictly — So in Con. when Trover is
concurrent with Trespass, the Court
11. Mod. 282. holds it not to be within the Stat. of
4 Bac. 650. Limitations. — The words of an
explanatory Statute are not to be
construed so as to extend the
meaning beyond the letter, otherwise
there would be no end to the con-
structions — E.G. The Stat. 34 Hen. 8.
the construction itself might be con-
strued liberally & so on in infinitum

Statutes partly penal & partly benefi-
cial, are to be construed strictly
in part & liberally in part, viz. lib-
erally when it operates on the offence
& strictly when it operates on the person.
Carth. 396 So the Stats. of Frauds which are
Salk. 534. generally penal. Hence when the
4 Bac. 650. stat. acts on the offence & inflicts
punishment, the construction is strict.
1. Bl. C. 88. Pr. Ch. but when it acts on the offence by
218. 360. 52. setting aside the fraudulent con-
Plow. 37. 57 veyance or transaction, the con-
struction is liberal —

The different parts of any stat. are to be so con-
structed that if possible, the whole may
take effect. Repeal by implication is not
favoured. But a saving or proviso which
3. Keble 236 is wholly repugnant to the body of the
1 Co. 47. 1 Bl. 89 statute is void & the enacting part is
Plow. 565 good. E.G. A stat. vesting the lands of
A. in the King saving the right of A.
2 Ven. 226. 4 Co. 381
6 Mod. 287. 1 Inst. If two stats. are repugnant to each other
111. 115. 19 Viner the latter in point of date repeals the other
511 or

a Former. So if the latter part of a
Stat. be repugnant to the Former, so that
they cannot be reconciled, the latter
repeals the Former in proportion to their
repugnancy. This is different from the
case of saving because this may be
proved a mistake & the other cannot 11. Co. 63
be accounted for from an inadver- 4 Bac. 638.
tence.

When the Common Laws & the Statute
Laws differ the C.L. always yields, the
reason is that the statute is most re-
cent (the authority which created the one 4 Bac. 638. 641.
created also the other) since the time
of making it can be ascertained. —
Just so as to the C.L. which is immemo-
rial. Indeed the Stat. Law is deemed
of higher authority. Every Statute in
its nature is repealable. Were it not so
there could be no continuance of sove-
reign power. The Legislature must be
the sovereign power if there is any. Re-
pealing is an act of the legislature, of
course a clause in a Stat. that it
never shall be repealed is void. This 4 Inst. 43
is in derogation of the power of subse- 4 Bac 638.
quent legislatures & therefore void ab 1 Bl. 90
initio. The law never favours a re-
peal of a former statute by implica- 11 Co. 63. 10 Mod.
tion, unless this implication arises from 118. 1 Rolle Rep. 88
a clear & certain repugnancy or incon-
sistency. When a former statute is re-
pealed by a repealing clause in a
subsequent statute, the repeal is called
an express Repeal, But when a Former

Stat.

Statute is repealed by its repugnancy to a subsequent one, it is then said to be repealed by implication. The Courts, however, in the latter case are bound to reconcile them if possible, for the former one, not being expressly repealed, is prima facie evidence that the legislature did not intend it should be. —

1 Bl.C. 89 —
Com. Dig. Tit. Action upon Stat. (C) —
2 Inst. 200
2 Burr. 203-5

It is said to be a rule of construction, that affirmative statutes do not abrogate the Common Law — Mr Gould thinks this incorrect, for frequently such statutes imply a negative of the C.L. i.e. may be inconsistent with it. E.G. The Common Law is that notice be given six days before the return day of the process & the Stat. 12 days. — Again suppose a penal statute inflicts a lower punishment than the Common Law, it repeals it of course, tho' there is no word of repeal, because the object of the legislature was to inflict a lighter punishment — Affirmative stat. sometimes gives an accumulative remedy, & then does not abrogate the Common Law — E.G. A stat. gives double damages for some trespasses, still the party may sue at Common Law — If a statute inflicts a higher punishment than Common Law, +it is called accumulative. Again it is said that an affirmative statute does not repeal an affirmative statute. This Mr Gould com-

1 Inst. 111. 115
4 Bac. 641. 647
10 Mod. 339-7
4 Burr. 2026
Bro. Parl. Cas. 70
Plow. 206.

2 Burr. 803
805.

+ See note on next page

conceives to be a very absurd rule for he says positively, one Statute repeals another if it is inconsistent with it. — If a statute inflicts a higher or lower punishment for a given offence than is prescribed by a former one, the former is repealed. Where the statute inflicts a higher punishment for a given offence than the Common Law, the C.L. is not abrogated. But when it inflicts a lower punishment then the Common Law is repealed. This rule is founded in the benignity of the law.

2 Shaw 30
1 Bl.C. 89
4 T.R. 3.

4 Bac 654
4 Burr 2026
Leach 252

10 Mod 733
Leach 252
4 Bac 654.
11 Co 77.33

+ note

Where the offence intended to be guarded against by a statute, was punishable before the making such stat prescribing a particular method of punishing it — there such remedy is ~~acc~~ cumulative & does not take away the former remedy — But where the statute only enacts that the doing any act not punishable before shall for the future be punishable in such & such a particular method, there it is necessary that such particular method by such act prescribed be specifically pursued, not the Common Law method of indictment.

2 Shaw 30

Finally

Municipal Law

Finally says Mr Gould I think the intention or will of the Legislature is the criterion in every case.

4 Inst. 235. 238 / 1 B. C. 90 / 4 Bac. 638 — When a repealing statute is itself repealed the statute first repealed is revived. If one statute should be repealed by three different ones & at some future period two of them should be repealed, the first still

4 Bac. 13. 4 Inst. 43. 48. — stands & still repeals the original one. If a statute which has been repealed is revived, the repealing statute

4 Bac. 638 — becomes of no force. It is a rule that when a statute is repealed, all acts done under that Statute are valid.

Jenkins 233 / 4 Bac. 638 — / 2 Mod. 311 / 1. B. C. 40 — When a statute is declared null ab initio by a subsequent Legislature all acts done under it are void. This Mr Gould says appears to him to be contrary to the first principles of jurisprudence. The legislature have no power to say such statute is void ab initio. They are not the persons who can decide on the constitutionality of the Law. It is the province of the Judges to say whether an act is lawful or not. If they decide that it is not lawful or constitutional then all acts done under it are void; for a void law will protect no man. If a statute is repealed by another statute which makes provision on the same subject, which provision is limited & expires at a limited time yet the former statute does not

13 East 265. — revive. As a general rule, no law can have a retroactive

operation, yet statutes do sometimes have such an operation. It follows then of course that if a statute has been violated & before judgment was rendered against the offender that statute is repealed & another new law is made on the subject the offender cannot be punished unless the new law declares that the old law shall be in force as to all offences committed under it, nor can he be punished if there is not any new law made — He cannot under the old Law, for there is no law authorizing the Judges to pronounce sentence & he cannot under the new law, for this statute was not in existence at the time the offence was committed. He may however as the case may happen be punished at the Common Law — This doctrine was recognized in the Circuit Court, U.S. in case of Treadwell

1 Hawk. 169 — 1 Root 59 — 1 B.Rep. 457 — 45

If one covenants to do an act which may at the time of covenanting be lawfully done, but it is afterwards made unlawful by subsequent stat. the Covenant is null & void — So if a person should covenant to export a certain article which should afterwards be made unlawful to export, the covenant would be void — On the other hand if one covenants not to do an act which is made his duty to do by Statute, the covenant is null or annulled — Thus a statute requiring every citizen to turn out in defence

8 T.R. 267 —
2 P.Wms 218 —
Salk. 198 —
1 Ld.R. 1352. 387
Roll 451 —

Salk. 198

in defence of his country annuls the
contract between the apprentice &
his master. Mr. Gould conceives nei-
ther of these cases to be inconsistent with
the statute, which enacts that the obli-
gation of contracts shall not be im-
paired by statute, for by that statute
is meant, that no statute in the terms
of it shall impair a contract. If
one covenants not to do an unlaw-
ful act & statute afterwards makes it
lawful the covenant is not annul-
led. In the two former cases, the
Salk. 198 — Covenant is opposed to the statute
1 H. Blks. 652 but in the latter case a perform-
ance is not inconsistent with the
Law. — If a contract declared ille-
gal by the statute is made while
that statute is in force, a subsequent
Repealing statute will not make
that contract good nor can it
1 H.B. 65-155 — ever be enforced. But when the com-
plete performance is made illegal
by a statute, yet if a particular
performance may be made consis-
tently with subsequent statutes, the
party if he wishes it may compel a
partial performance & this par-
~~1 H.B. 65 a 155~~ tial performance may be enforced
2 T.R. 254 — by a Court of Chancery — indeed
2 H.B. 113. 581 Mr Gould thinks in some cases in
2 P. Cont. 131 — a Court of Law — Such contract must
Cowp. 359. be made before the prohibiting statute.

Municipal Law.

The rule is the same when a complete performance is rendered impossible by the act of God. Thus if A. covenants to convey to B. two Houses & one is burnt down by lightning, still he shall be bound to convey the remaining. The retroactive law cannot be said to operate in this country even in the cases abovementioned because such a law would be unconstitutional.—

1. Pow. Con. 448 to 50
Plow. 284
Con. U.S. art. 1 Sec. 10—

It is said that a statute requiring what is impossible is of no validity or void. And it is said by Ld Coke that stats. contrary to the Law of God & Reason are void— This principle is admitted in one part of Justice Blackstone's Commentaries & denied in the other. Mr. Gould conceives it to be a proposition which cannot be supported. He says ~~that~~ Judges are bound to follow & to enforce laws that are contrary to the laws of God. But whether legislative acts contrary to the constitution are void is quite a different question. It is clearly settled in the U.S. that they are void & Courts of Justice are at liberty to declare them so. The object of the constitutional law is to restrain legislative usurpation.

Publius in 2 Federalist 293
278. 1 Tucks No 2
B.C. 91—

It is said that when a statute enables a Court to do a matter of justice to a party the Court is bound to do it in cases falling within the statute, & the party may or shall claim it as a matter of right.—

4 Bac. 644
5 T.R. 538
2 Hawk. 263. 376
2 Stra. 1121

If a Statute makes a new law concerning an old offence & constitutes a

1 Mod 452
1 Hawk 89. 114
9 Co. 118
Salk 561
Cowp. 524
2 Burr 1042

constitutes a new Court to execute that law, still the ordinary Court of Criminal Jurisdiction is not ousted of its jurisdiction – If a statute enacts that all criminals of a certain particular description shall be tried by certain particular Judges the rule is the same, because the jurisdiction of a Court is not to be ousted by implication – If the jurisdiction of the ordinary Court of Crim. Jurisdiction is ousted in this case it must be done by implication & it is clearly established that the jurisdiction of Courts of Gen. Jurisdiction is never ousted by implication. But if the Statute creates a new offence and also creates a new jurisdiction for the trial of it, the Court of ordinary jurisdiction is excluded. The authorities are not agreed upon this subject, however, it appears to Mr. Gould that the Court of K.B. would be excluded. It is so in Cowp.

1 Hawk 9.
2 Hale 5
1 Sid 196
Cowp. 524
Cro. Jac. 642-3
Hawk 302

If a special authority is given to certain persons affecting the property of individuals, that authority must be strictly pursued & it must appear upon the face of the proceedings strictly to have been pursued, otherwise it is not valid. When a statute enables a certain number of men to transact business by a vote of a majority & constitute a certain number of them a quorum, it is a question whether a majority of that quorum can bind the whole body. The better opinion is that a majority of that quorum is not binding - By the civil Law it seems to be the better opinion that the voice of a majority of the members of a corporation, when two thirds or more were present, was the voice of the whole, & it was not necessary, as maintained by Blackstone, that two thirds of the whole number who were members of the corporation should agree in a vote. — These bodies have no power except such as is given them expressly or such as is inseparably incident to them. It seems that a private authority enacted by statute & conferred on two or more persons is joint & not several, unless it is otherwise expressed & the power ceases on the death of either of them. But it is said if a power of a public nature be given to several, the acts of the majority will bind the whole, all being present. The rule preceding does not affect corporations For where a corporation is created, a majority of those present, can act for the whole - The individuals who compose it are not regarded —

3 Mod 13.
4 Bac. 642
10 Co. 30 Hob 211.
3 T.R. 594. 4 Dc.
8.10.822. 1. R.U. 513

1 Brow 6
8 Admlty Law 147

1 Root 67 Pow.
Dev. Tett powr
to Devise —

1 Inst. 181b.
1. B&P. 229 or 336
2 Burr 1017. 1020

2 Atk 202. 212
1 B&P. 236-7. 231

There is a very material rule laid down as to the construction of word void. A void & voidable act are very different. A void act is a mere nullity ab initio. A voidable act, stands good until it is set a side

1 Inst. 45. 36. 59. 60 Cro. E. 309 — 1 B. C. 87 — aside by due course of law. A void act can never be ratified. A voidable one can. A voidable act can only be taken advantage of by the party or his representatives. —

2 T. R. 606. 7 & 310 Cro. E. 141 The rule as to the construction of these words is if the object of the legislature can be obtained by construing the word void the same as voidable, then the word is construed as if it were voidable, but if the object of the legislature cannot be obtained by such construction, then the word void will have its strict construction. This distinction is not found in the books. The authorities cited are mere exceptions. The rule as to the construction of Statutes is the same in Courts of Equity as in the Courts of Law, 3 Bl. C. 430 — 1 438. 1 Fonb. 22 Doug. 264 — but the mode of enforcing the law is many cases different. — And here it may be observed that the rule of construction is the same in contracts, except in Penal Bonds & Mortgages —

Sect.

Of Pleading Statutes & the mode of Prosecuting on them.

There is an essential difference between Pleading, counting upon, & reciting statutes. Merely to plead a statute nothing more or less is necessary than to show that the facts come within the statute. For example the stat. of limitations — nothing more is necessary than to plead "non assumpsit infra sex annos." R. 11. 224 — Counting upon a statute consists merely

Municipal Law.

merely in an express reference to it, as "against the form of the stat. in such case made & provided" or "by virtue of such statute made & provided." Reciting a statute is to quote its contents. + It is a general rule that ex officio judges are bound to take notice of public statutes, but not of private statutes unless they are set forth & specially pleaded. — The rule is the same concerning private statutes as concerning Bonds or other private Contracts. In Con. under our rule of pleading the Deft. may give in evidence under the general issue any private statute. But here he must read the statute as any other private document. A private statute must always be recited. — But here as in England the Plff. if he brings his action on it — it must be set out as deeds &c. A public statute when required to be pleaded or counted upon, need not be recited. — It is a rule that a private statute may be given in evidence without pleading it, yet it must be read in Court, otherwise there would be no evidence to support the General Issue.

+6 Co. 2. 16 Co. 57.
1 Bl. C. 86. Co. Lit.
2. 36 — 2 Woo. 57
1 Bac. 380.
383 —

+ The reason is that the public stats. are the laws of the land & the Judges are bound to know it. But they are presumed to be ignorant of private statutes. If one sues another in an action of debt & the deft. wishes to take an advantage of an act of insolvency, it must be specially pleaded. Causa supra —

Municipal Law

2 Swift 215

Judge Swift of Con. lays it down in his "System" that the Stat. of limitations must be pleaded in an action of Assumpsit – tho' it is the prevailing opinion that it is not true at Common Law – For under the General Issue, non assumpsit, giving the Stat. of limitations in evidence acknowledges the promise & therefore contradicts Def.'s plea – The Deft. ought therefore in such case to confess the contract & plead the Statute in bar. –

Cro. Car. 376, 136
552 – 522.
1 Viner 558 –
Cro. E. 236. 245
4 Bac. 658.

Com. ~~447~~ 474
Doug. – 90
Cro. Car. 376
Plow. 84. McNally on Ev. 576
1 L.d R 382
2 Mod. 241
Doug. 90 –

Though it is not necessary to recite a public statute, yet a misrecital in a material part, will be fatal even after verdict, though the stat. need not be pleaded – This misrecital of a public statute is not fatal says Lord Holt, unless the person ties himself up to it, as by reciting the statute & concluding with the words "against the form of the statute afores.d" Mr Gould thinks the first rule is the correct one, where the mistake is in the material part or any other part. After verdict a misrecital of a private statute is not cause of Error, for the pleadings appeared good on the face of them. If the statute is misrecited advantage may be taken of it by pleading nul tiel record or by pleading oyer of it – show the misrecital & demurr. In this respect a private statute is tried like a deed. It is

1 L.d R. 382
2 Mod. 241
1 Tida 350 – 58 –
McNally Ev. 579
4 Bac 655 –

Municipal Law.

It is a general rule that a public statute need not be pleaded, but this is not universally true. A public statute in England when it is used to defeat a specialty, must be specially pleaded. 3 Co. 59.119 — 5 Bac. 419 — If to a Debt on bond, the deft. would defeat the specialty he must plead but not recite the Statute. Hale 172—73 Salk. 311.391 — Yet to defeat a simple contract he need not plead it. One who would found his action on a public statute must plead it, for the Plff must state the particular ground of his claim, but he need not recite the public statute — In England if there is an action of Debt on bond, which is usurious, the deft. to take advantage of the statute must plead it specially & cannot plead non est factum as in Con. & give the statute in evidence. 5 Co. 57.63.119 3 Salk. 391 — He who declares upon or otherwise pleads a private statute, when it is necessary to recite it, need not recite it verbatim, for a recital of the substance is sufficient. 2 Roll 466 4 Co 76. 2 mod. 7 — If a statute is part public & part private it must be recited as to the private part & the Judges are bound to take notice of the public part ex officio — 11 Co 57. But it is never necessary to recite the title or preamble of any statute, for neither constitutes any part of the Law — 3 Co. 33. 4 Bac. 655.658. The misrecital of the title or preamble is not fatal. — Mr Gould says he has known several instances, where the misrecital of the ~~title~~ or preamble of the statute has proved ed is fatal. But it was once holden that the misrecital of the title of a public statute is not fatal, though modern cases say it is. This Mr Gould thinks ought to be taken subject to the rules already given. When it is necessary to recite a statute, the party must give the date & place where it was made.

LR. 77 —
6 Mod 62 —

4 Bac 557. 2 Hawk.
246. Cro. Jac. 271.
Cro. Car. 232 Cro. 474

When a private statute is pleaded, the other may plead nul tiel record; for the question, whether there is such a statute is a question of fact & to be tried by a jury. But nul tiel record can never be pleaded to a public statute, for this cannot be tried by jury. Yet, the Court are to determine whether there is such a statute or not. In declaring upon public statutes it is not necessary to count upon them but the plff must plead them. It is unnecessary to set them forth. To plead a stat. is nothing more than to state the facts which come within it. To this rule there are three exceptions. 1. If the party has a remedy at Common Law & at Statute he who would found his action upon the statute must count upon it, otherwise it will not be known that he intends to found his action upon the statute & his action will be supposed to be founded on the Common Law. There are many cases of this kind.

8 Co. 28. 4 Co. 76.
Cro. Car. 232-5 —
2 Mod. 57.
4 Bac. 655 —

Cro. Eliz. 601 —
Carth 382 —
10 Vin. 565
1 Bac 38 —

1 Hen. 3d. 356. Lutw.
584. 4 Bac. 11. contra

2d So in actions founded on penal statutes, tho' they are public still the plff must count upon them. The reason of this rule is unknown to Mr Gould, tho' he says that one may exist.

1 Bac 38.
Mil. 32. Vin. 103
2 Hawk. 356. 4th Inst.
321. 2 East 333.
Plow. 204 —
2 T. Rep. 521.

3d If a public statute gives a new form of action unknown to the Common Law, it is necessary to count upon it if the plff would found his claim thereon. This is the case

when

the case when a new species of action 4 Bac 652-6
is given. But when a statute extends 19 Vin 584
an old remedy to a new case, it is 2 East 334, 339. 341
not necessary to count upon it. To Salk. 565
be more plain, when actions are foun-
ded upon statutes purely remedial,
as when a stat. creates a right or en-
joins a duty & furnishes the remedy.
(so also if a stat. creates a right, or
enjoins a duty & furnishes no remedy
it, is not necessary to count upon the
statute; because the statute merely creates
the right or enjoins the duty and leaves
the punishment to the Common Law.

In actions on public statutes which 1 Com. 230.
are remedial or beneficial, the gen- 19 Vin. 563
eral rule is that it is not necessa- 2 Bac. 439-440
ry to count upon them. Likewise Dyer 83, 85
when the statute does not expressly give any 2 Com. 214-30-40.
remedy at all, it is not then necessa- Carth 282
ry to count upon it. Salk. 212

If one statute prohibits an act & another 19 Vin 505
inflicts a penalty, it is necessary to Plow. 206
count upon both. 2 East 533
4 Bac 656

When there is an offence against
the Common Law & also against the
statute, you may in the indictment
lay the offence as against Common Leach 235 a 255
Law & also upon the statute. But this
must be done in two counts.

If a temporary penal statute has expired 4 Bac. 633. 656
and is continued by a subsequent one Str. 1066
counting on the former is sufficient.

If the words "against the form of the
statute" are inserted in an in- 5 T.R. 362, 363
dictment for any offence at Com- 5 T.R. 162
mon Law & not by stat. such words Robertson F. 202, 204
though useless will not vitiate the 12 Mod 540
plea. They are considered as mere Bul. N.P. 274
surplusage Robertson on F. 202, 4

Municipal Law

12 Mod 540 —
Bul. N.P. 279 —
3 Burr. 1800 —
Th. Ra. 450-480
Coup 28
1 Root 47. 28. 140 —

If a contract good at Common Law by parol is by Statute required to be in writing, the evidence may show that the contract is in writing. Such a Stat. introduces a new rule of evidence, but no new rule of pleading.

Cro. Car. 279 —
2 Wils. 375-6 —
Esp. Dig. 265. 307 —
b'g 58. a 66 43
Cart. 279-383
5 Com. 235
12 Mod 570 —

But if such a contract is pleaded in bar to an action, it is said to be necessary to aver that the contract was in writing. Yet if writing is necessary to the validity of a contract at Common Law, it is necessary in the pleading to aver the contract to be in writing. Thus a contract of apprenticeship at Common Law must be in writing, & in pleading it must be averred to be in writing or the plea is bad. But when a Statute makes writing necessary to the validity of a contract, which contract is unknown to the Common Law such contract must be declared to be in writing, as in the case of devise of lands.

Roberts on Frauds 202. 12 Mod 540
5 Bur 656 —
Salk 519 —

Stra. 497
1 T. R. 141
1 Burr. 153
5 T. R. 83
6 Do 559
7 Do 27
18 Do 540-2
1 East 646
Doug. 331
Lord Raymond 120.

In pleading statutes, the exception in the enacting clause must be negatived by the prosecution, and an omission to do it vitiates the pleadings. But an exception in a distinct clause need not be negatived by him who prosecutes.

The Deft. may do this by way of defence. Exceptions in the enacting clause go to the description of the claim or right enacted, but exceptions in the distinct substantive clauses do not go to the description of the claim or right. These rules are happily exemplified by the Con. Stat. on Sabbath breaking. The complainant must deny that the breach

Municipal Law.

breach was for "necessity &c" merely, and need not negative the exception in a subsequent clause, which makes it necessary that the prosecution should be instituted in one month.

When there are two subsisting remedies in the same case, one by Common Law and one by Statute, either of them may be pursued. In cases of this kind if the plf. pursues the statute remedy, & thro' want of evidence or the like cannot support his action, he may in the same suit recover upon the Common Law rule or remedy; & this may be either in a civil or criminal action, even though he should count upon the statute.

2 Hawk. 352
Bac. 235
2 Burr. 799
803. 805. Salk.
45. Cowp. 64
or 648
Moore 750
2 Keble. 138
1 McKn's on Ex.
493. 1 B. Rep. 910
1 Hawk. 211. 2 Do.
352, 356.
Salk. 212.
5 T.R. 147
2 Hale 191

The authorities which contradict the above rule next follow.

If that which is no offence at Common Law is made illegal by Statute, and a particular mode of prosecuting it pointed out by sd Stat. that mode must be pursued and no other will answer. But this rule holds only in two classes of cases, viz. 1. When the particular mode is prescribed in the prohibiting or enacting clause, so that the mode is incorporated with it. 2. When there is no prohibiting clause and the statute says whoever does thus & thus shall be punished so and so— Here is no offence created by the terms of the Statute. But when this mode of prosecuting is prescribed in a separate substantive clause, the rule does not hold, and this is generally the case.

5 Co. 99— Cro. Eliz. 231
3 Co. 20b. 60b. 2 Hale
71. 170. 101, 6
Cro. Jac. 644
Salk. 46. 48
2 Co. 36. a
2 Burr. 803. 834
4 Burr. 2323

case, that other modes of prosecution may be pursued which are good at Common Law.

2 Burr. 515.531
2 Hawk. 362
2 Str. 202.205

Yet if that which is prohibited by statute was also prohibited by Common Law, and the statute prescribes a new mode of prosecuting it, still the mode of prosecuting it at Common Law is not precluded.

Dougl. 425
Leach 280
10 Co. 75. 77
1 Bac 65
1 Burr. 544
6 Mod. 26
19 Vin. 512.513.
Cro. Eliz. 655
Doug. 125

The statute is only an accumulative remedy. If a statute creates a right or an offence and gives no remedy, the Common Law will furnish one.

To obstruct the execution of any power granted by a statute or statutes is an offence at Common Law, and the indictment need not nor ought not to conclude "contra formam Statuti".

If a civil right is created, and the Plf. injured wishes to bring his action, he must bring it upon the statute tho' formed on the principles of the Common Law.

Who may prosecute on penal statutes.

2 Hawk 365
4 Bl. C. 2.5.6.

It is a general principle of the Common Law, that an offence is not to be prosecuted by any individual in his own private capacity, for the public is the party injured, and the remedy belongs to the public.

Leach's Crown Ca.
242. 233. 298
260. 278. 47
190. 195. 205

The statute law may enable an individual to prosecute for an offence done to the public, but this is for the King or state. This practice has never been allowed in Con. In England however private individuals may & frequently do prosecute offenders even in felonies. But this is in the name of the King.

Municipal Law.

of the King by information on the part of the prosecutor; which is generally done to recover his costs or penalty. — There is a species of mixed prosecution partly public & partly private prot. partly in the name of the King and partly in the name of the subject; which is called a qui tam prosecution. This an action or prosecution sui generis.

1 Hawk. 264
1 Bac. 37.
3 B. C. 162.
4 D° 308 —

A qui tam action & a qui tam prosecution differ in this, viz. the first is a civil suit, & the form of civil suits must be preserved & pursued; the party may appear by attorney &c. &c. But the latter is conducted by criminal process & consequently the prosecutor must appear in propria persona — Any qui tam action brought by an individual to recover a penalty is a civil suit — they are almost universally founded on penal statutes — And in the case of a qui tam action the statute of jeofails, justifies an amendment of the record — There is also another species of action founded on penal Statutes, called a popular action, which is very often improperly confounded with a qui tam action.

Cro. Jas. 360
3 Bl. C. 161
4 D° 308 —
Comp. 382 —
Bac. 34 —
Cro. Eliz. [illegible] —
2 Hawk. 377 —
265. 1 Rol. 11 —
1 Bac. 34 —
Com. 34 —
Cro. Eliz. 377 —
4 Bl. C. 308
2 Hawk. 347
Cro. Jac. 360

A popular action, is one which is given to any person who thinks proper to prosecute & recover a penalty incurred by the violation of a penal statute. — And if the prosecutor recovers the whole or a part, of the penalty the action is still "popular." A right to prosecute

Hawk. 347
3 Bl. C. 161 —
2 D° 137 —

prosecute qui tam-wise is frequently given to the party injured only. If the whole penalty is given to the party who will sue for the injury, it is "Popular" (not in qui tam). Whenever a statute prohibits or commands a thing for the benefit of an individual, he may have a remedy by an action founded on the statute.

1 Bac. 57 or 8
2 Hawk. 265
3 B.C. 161. 162
1 Com. Dig. 229.
6 Mod. 267.

If an individual is civilly injured by an offence prohibited by statute, he may have his civil action on the statute.

Com. Dig. Title
Act. upon Stat.
A. 1. 4 Bac. 658
1t 6075 or 750. c.

When a statute inflicts a penalty for dispossessing any one of his right, and does not appropriate the penalty, it belongs to the party injured and not to the King.

1 Burr. 159
3 Lev. 290
298

In what cases qui tam actions may be brought.

If for an offence immediately injurious to the public a statute gives a penalty & part to him who shall prosecute for it, any person may prosecute qui-tam-wise.

1 Com. 227.
3 Do. 518
4 Co. 11. 13
2 Hawk 265
Com. Dig. 1

When the offence is immediately injurious to the public only, no individual can prosecute qui-tam-wise, unless the penalty or part of the penalty is given to the prosecutor or a sum certain.

1 Bac. 37 note
2 Hawk. 265
377. 2 Jones
234

If a statute prohibits an offence immediately injurious to an individual, he may have a qui tam action tho' the statute does not expressly give

2 Hawk 377.
1 Bac 37. 4 Co.
13 a 12 Co 134
6 Co. In. 134
Dyer 159

the party the penalty, or any part of it, or tho' it does not provide he shall recover his own damages. This rule is not well settled, tho' Mr Gould, thinks it is good Law —

When a penal statute expressly gives the whole penalty to a party, he need not join the King, but may sue alone.

1 Com. Dig. 228. 229 —

In conformity to this rule, qui tam actions are given in Con. in cases of Theft, forgery & many other cases.

2 Swift 183

When a fine is given to the King & a civil remedy to the party injured, the fine may be inflicted of course on a composition of the offender in the civil suit. This is by Common Law. It has not, however been the usual course in Con. Where no form of action is prescribed for the recovery of statute penalties, the action of debt is the usual one. Mr Gould says that this has been held to be a good action brot for the recovery of pecuniary penalties. Tho' says he, the action of debt seems to be a strange action to be brought on this occasion. But it is founded on fiction. If the law says "if a man do thus & thus he shall pay so much", he is considered as having promised to pay when he violates the law. There is a kind of privity of contract raised between the prosecutor & the prosecuted.

Carth. 390
2 Bac. 566
4 Bac. 117
Salk. 636
5 Bac. 191. 193

Bohh. 175
Esp. Dig. 4
Carth. 192
4 Bac. 653
2 Lev. 252

When

Municipal Law.

When part of a penalty is given to the King & part to the prosecutor, the King if he prosecutes may receive the whole penalty. It is the same in the U. States, mutatis mutandis.

4. Bac 553
3. T.R. 262 n.l
11. Co 65. b. c. 66. a.
Cro. Jac. 480
1 Bac. 41. 2
Hawk. 275
390. 1 Comm. 229

A bona fide conviction or acquittal on a qui tam prosecution is a bar to another prosecution for the same thing. There may be a mere sham prosecution as conducted by the friends of the prosecutor, & here if the action is qui tam there will be no bar to a second prosecution.

Cro. Eliz. 261
Hob. 204. 3 Burr.
1423. 2 Hawk
275. 390. 391
1 Bac. 41.

The pendency of a qui tam prosecution may be pleaded in abatement to a subsequent indictment for the same offence. In 1. Bac. 41 it is said it may be pleaded in bar, but this is incorrect.

2 Hawk 193
Cro. Eliz. 597
Cro. Jac. 114
5 Co. 48. a
3 Burr. 1423,

A suit is considered as pending in England from the time of purchasing the writ, & not from its return. The Sup. Court in Con. have decided, that a suit is not considered as pending in a civil action till process served.

3 Burr. 1423. 810
2 H. Blkst. 310
2 Stra. 1169
11 Co. 65.
2 Hawk 391
2 B. Rep. 437
1 59. 2 B. C. 437
2 Lev. 141,

A person claiming a penalty under a penal statute, has no right to it till he commences prosecution. By commencing the prosecution he obtains an inchoate right, and this right is consummated by the judgment. But the King may release the whole penalty, if he does it before the action is brought. In case of a remedial statute it is otherwise. For here the party so soon as the injury is done has an inchoate right to compensation and damages for the injury. After a qui tam

2 H. Blacks. 311.

qui tam action has commenced, the King cannot take away the rights of the prosecutor to the penalty or punishment, or prevent the prosecutor from proceeding to recover it. The King may release his own right to the penalty.

3 Inst. 194
2 Bl. C. 437
1 Com. 221

It is said however that parliament can release even after the commencement of the suit. Mr Gould thinks not unless it is done by a repeal of the penal Law.

1 Bl. C. 437

When a statute gives part of a penalty to the party aggrieved, the King cannot discharge the party's right even before suit is brought, because the statute is remedial so far as it respects the individual.

Moore 58
2 H. B. 311
Noy. 100.
2 Hawk. 276. 392

Before the statute was made to the contrary, the prosecutor could release his part of the penalty after the conviction in a popular action. Yet this occasioned sham prosecutions for conviction, to prevent a second prosecution.

2 Roll. Rep. 33

It is provided by Stat 4 Henry VII that no recovery in a popular action shall be a bar to any other prosecution for the same offence, and that release either pending the action or after conviction shall be of no avail.

2 Hawk. 392
3 Bl. C. 162

Mr Gould thinks that by Common Law principles a sham qui tam prosecution will be no bar to a second prosecution for the same offence, and therefore ~~that the~~ Statute 4 Henry VII is in affirmance of the Common Law, for the first proceeding is void

as to Games at Com. Law see
1 Burr. 395
3 Co. 77

Municipal Law

is void. A bona fide release by the Plff. after conviction, will not bar the King from prosecuting for his share of the penalty. Now by the statute 18. Eliz. the prosecutor may not compound the prosecution at all, till after the Deft. has appeared in Court, nor then without leave of the Court, under pain of the Pillory. If the Plff in a popular action release or suffer nonsuit, the King may still proceed in the same suit or institute a new prosecution.

1 Bac 43
1 Stra 167
2 Hawk 392
1 B.& P. 18
5 T.R. 98
5 Co. 48
Cro E
2 Hawk 392
11 Co. 65. 66
3 B.C. 162

If several persons are convicted together in a popular action for violating a statute, only one penalty is recovered, but if they are prosecuted by the King each one pays the penalty. In the former case the penalty is considered as a debt and those by whom it is incurred joint debtors. But in the latter case the penalty is inflicted for the crime as a punishment.

Cro Eliz 480
Salk. 182
4 T.R. 109
Cowp. 610
B.N.P. 189

Mr Gould thinks there is no solid foundation for this distinction.

One offence may consist in a number of facts, & one fact may constitute a number of offences —

B.C. on Public wrongs
Cowp 649

When several acts constitute but one offence, there can be but one penalty.

In popular actions in England the Plff is intitled to no costs, unless they

13

1 Bac. 42 — they are expressly given by statute.
519. 571 — But when the party only who is
1 H B. 10 — injured prosecutes, he is intitled
Keble, 781 — to costs as in other cases on action

Baron and Feme.

By.

Hon. Tapping Reeve.

Baron and Feme.

The right which the husband acquires by marriage over the Personal Property of the Wife.

Personal Property is of three Kinds.

1 Property in possession as money, cattle &c.
2. Choses in action, as rights to damages &c.
3. Estates in lands which a wife has during

— 1. The husband acquires an absolute right over all the personal property in possession of a wife, & her right is entirely destroyed.

This law may operate injuriously to her creditors, for altho' he is liable for her debts during the coverture he is not after this is destroyed. Suppose A. marries B. with a fortune of £10,000, and she dies before the creditors collect their dues they can obtain nothing. But if the husband die she is still liable altho' he may have spent all the property he received from her. — The husband's liability does not arise from his having received her property but because the law supposes him to be [illegible] with all her circumstances. — But

1 P. Wms 416.
2. D° 400
3. D° 410.

Baron
Feme
&

But on the whole, the creditors of the wife are so far from being injured by the law of Baron & Feme; for if the husband receive no property he is liable during coverture, for all her debts & when he receives property by her he is not liable to the extent of that property, but only for the ~~whole amount due~~ he then, is not liable on the ground of having received property, neither is he considered the debtor, but she is; what then is the ground of her being sued with him also? They sued in order that if the husband die before judgment the suit may proceed against her — she is also the real debtor. The ground on which the husband is sued is a matter of policy in providing for the wife; as she has nothing of her own during coverture, it would be nugatory to sue her; nor can she be imprisoned without her husband, nor can he discharge himself without discharging her in any civil case, so too, if he breaks prison she must also be discharged. — There is but one case to the contrary & that is when a suit is commenced against her before marriage & they will proceed against her as a feme sole, & as the judgment must follow the writ, she will be taken on execution as a feme sole, in her maiden name. — The liability on the part of the husband was for the wife's benefit & not a security to the creditor.

2. The husband's right to choses in action

which are notes, bonds, contracts, damages for injuries &c, is not so extensive as that to personal property in possession; but when these *choses* are reduced to possession the right is the same in both; He then has a right during coverture to reduce these choses *in action* to possession, but if he does not before his or her death, in the first case they will survive to the wife, in the second they go to her next of kin or legal representatives according to the common law. But can the husband assign these choses in action? Yes, as his own property, except that he may give his own property away, but these he can only assign for a valuable *consideration*. If this be a bona-fide assignment for a full consideration & not a mere colour to exclude the wife's right, she will be bound by the assignment. J. R. conceives even tho' the consideration should not be precisely equivalent to the value of that note. — Can the Husband devise her choses in action? No, except he has been a purchaser of them, which happens in equity when he makes a complete settlement on her & jointure which only bars dower before marriage. In this case the choses are his without any reduction to possession or assignment for a valuable consideration. — A Jointure bars dower only, but never purchases a chose in action. A settlement never bars dower,

but

Fanny [illegible]

2. Atk. 270.
417.

Baron & Feme

but purchases the chose in action.

Since the introduction of Courts of Chancery, it is very common for one person to have a right to property of which another has the legal title. As if 1000£ be given to John Stiles for the use of his sister Sally — When the wife has property of this kind how can the husband obtain it? He must request the trustee to pay it to him, or if a chose in action to collect it for him. If the trustee refuse, the husband may compel him to let himself sue it in the trustee's name, by application to a Court of Chancery, which will not lend its aid unless the husband shall have made a competent settlement on his wife — It does not, however, generally exact this if the wife appear in Court & waive the settlement. But should it appear that this waiving is not voluntary on the part of the wife, or made to procure family peace, or for a similar purpose, the Court will still grant the settlement. Should the trustee, however, give up the chose on demand, the Court of Chancery cannot require a settlement, but the trustee may as the price of his compliance, & the settlement will be good. The Court of Chancery cannot prevent the trustee from paying to the husband, if he please, the principal or interest, or even both; its interference is only discretionary & it may exact any condition as the price of its interference.

2 P.Wms 102.
2 D° 641.
3 D° 12.
Atk. Rep. 179.
2 Vez. 699
579.

Chancery

Baron and Feme (D)

Chancery however, will sometimes order the trustee to pay the husband the interest without the settlement, as a provision for the support of the common family. But if the husband already received the fortune with the wife & has not made a settlement, chancery will let the interest accumulate with the principal in the hands of the trustee for the benefit of the wife. The assignees of a Bankrupt cannot obtain possession of this property any more than the husband himself without making a provision for the wife. But if the chose has been actually assigned bona fide, for a valuable consideration, Chancery will not compel a provision from such bona fide actual assignee.

3 Atk. 21.
2 Ve. 676.
1 P. Wms 382.

3 Atk. 240
2 P. Wms 650.
1 Ve. 7. 18.
Prec. Chan. 414

2 Atk. 67. 420.

A question of much magnitude has grown out of this law. The husband under existing laws, is administrator of his wife. Common administrators are obliged to distribute the surplus to the next of kin. But what is the duty of the husband, as administrator with respect to those choses not reduced to possession? At Common Law he is obliged to dispose of the assets like any other administrator for the payment of debts in the first place, & in the next, by the Common Law, he must divide the surplus among the next of kin. But it is contended in some of the states, that he is entitled to the surplus, by the marital rights, say some, but, says Judge Reeve, of the

Admr
Feme
&

if he be so entitled, it is not at the same, but from an English Statute which is adopted but in few of the States; yet where it does exist there can be no question but the English Statute has a binding force here, because made after the emigration of our ancestors; in answer to this it is said the Statute is in affirmance of the Common Law — here is the question.

I will now give a short account of administration, which being historical will throw some light on the question. The administrator must pay the debts and by the Stat. 29. Car. II need not distribute the assets. If a stranger be adm^r he must pay over the surplus to the husband; but a stranger can only administer when the husband refuses. Every State in the Union has a statute founded on the 22. Car. II. differing however from it in many respects. Under this statute the question "whether the Husband were entitled to the surplus" arose, and in order to settle it, among other things was made the 29. Car. II. This depended on the principles of the Common Law relating to administration. The King as "parens patriae" was entitled to administration — the wife in this case was entitled to rationabilis pars, which was a third; the children to another such third, nor could the Husband deprive them of this by his will — & so to the remaining third

the

Burn's Eccl.

the husband might dispose of it after the payment of debts. Suppose he made no will, what was to be done with the surplus? This was to be applied for the benefit of the soul of the deceased, and as the clergy were considered the most proper trustees of such property, who acted on the part of the King, & were vested with no more rights than he has, they received it, & applied it to purposes which they called "pious". For the discharge of this trust they were accountable only to God & their consciences. In case there was a breach of trust, which was very common, wives & children were defrauded of their rights as well as creditors & thus were their rights without remedy. At length the legislature began gradually to check these abuses & in the reign of Hen. II gave an action to creditors against the Bishops, who was then obliged to pay the debts of the deceased. By a statute of Edw. III the Clergy were directed to appoint an administrator, because it was more convenient to sue him than the Clergy. This adm.r must be next of kin to the deceased, & the husband being so to the wife (next of blood not being meant) he was generally appointed in such case. Here then we perceive the husband's acquired right of administering upon his wife's estate, having an equal right with

4 Reeves His. 71. 85. 557.

the Bishop

Baron and Femme

the Bishop. Afterwards, by Stat. Henry VIII administration was to be committed to the wife or next of kin. This, however was not construed to oust the husband of his right of administration of the wife's estate. The wife's kindred distributed the estate as the clergy ought to have done. In some cases, however, they claimed to be exempted from any liability in law, as were the clergy with whose rights they were invested. A solemn decision was at length obtained, to the surprise of every one, that they were not liable; the husband was therefore not more liable than the rest.

[illegible] 84. H. 5. 33. 141

After the termination of the civil war a Stat. 22. Car. 2. was made to compel a distribution by the administrators. From this view of the subject it is manifest that the stat. gave no right not before given at C. L., but enforced the remedy; the husband therefore, was only bound as any other administrator; but, by 29 Car. 2. he is permitted to retain the wife's choses in action as to the payment of debts. This stat. says J. R. is clearly not in affirmance of the C. L. but alters it. In several states there is no such statute as 29. Car. 2. & that statute for the reason above mentioned is not binding in U. S. I apprehend, therefore, that

I apprehend, therefore, that in those States of which Massachusetts is one, the husband must distribute the surplus to the wife's next kin. In the cases on this subject there has been no decision in Massachusetts, tho' had it not been for the compromise in which the husband gave up two thirds it would have been decided that he was bound to distribute. ——

Parson, Hume

I shall add only one thing more with respect to the wife's choses in action. If an annuity be given her before marriage, being an incorporeal hereditament, the husband cannot dispose of it any time, because it is not personal but real property, but the arrears that accrue during coverture belong to him as husband & those which accrue before coverture are like any other choses in action in this country, tho' in England it is given to him absolutely by Stat. Henry VIII not in force in U. S.

4 Co. Rep. 51.

There is one species of choses in action which requires a separate consideration. — When judgment is obtained in his own or in his wife's name & either of them die before it is collected, what becomes of the judgment? Will it go to the wife if he die first? Yes. If she die first will it go to her representatives as any other chose in action? No. It becomes his absolutely,

and I

Baron
Feme
&c.

and he is not liable for it to pay her debts as administrator. On what principle is this an exception to the general rule? It is founded on the doctrine of "jus accrescendi" because they are joint tenants to this judgment & of course where this doctrine prevails, it will go to the survivor. In some of the States, this doctrine of jus accrescendi is exploded, & J. R. thinks it will soon be the case in all of them. What will become of the judgment in this State (Con) when the wife dies before collection? In the other States the Husb and Wife are tenants in Common of this judgment. If we preserve the law of Baron & Feme entire he must account for it as Adm. & must consequently collect it as tenant in common & then he can have no more of it — than he has an interest in it, which is only to the amount of his costs which is the utmost extent to which a tenant in common is entitled. —

3. Of the wife's Chattels real. — These are personal estates in lands or rather chattel interests in lands, which are estates for years. To levy execution of statute (Staple de conoizs) chattels real, for every estate is such which is less than freehold. The right which the husband has over these is 1. He may dispose of them as he chooses. He may lease them to commence any time after his death;

Co. Litt. 300
335 1.
1 Roll. 343.

They are

Baron
Feme

They are also subject to pay his debts, to execution, which choses are not because in their own nature they cannot be, being mere evidence of debts.) If they are not disposed of during coverture they (will survive to the wife like choses) but if she die first, they go to the husband absolutely, not as choses which go to him merely as admr. But of this there arises a question, which I will notice (concisely. If the husband mortgage the wife's term, as he may since he can dispose of it, & she die, he is entitled to the redemption. For this difference between choses & chattels real, there is no other reason than that it is thus written. The Books say they survive to the husband as joint tenant. If so, when joint-tenancy does not prevail they will go to him as) any chose in action, he being admr. J. R. thinks this principle of joint-tenancy unsound, because it is necessary to constitute it, that the title accrue at the same time which is not the fact in this case. Again, the title of joint tenancy arises from the act of the party & not by operation of law, as this title accrues to the Husband. Also in joint tenancy they must have the same kind & quality of estate, which is not the case between

1 Roll. 341. 345.
Prec. Cha. 418.
1 Vern. 270

Hob. 13.
Plow. 263

Baron & Feme

between husband & wife in her chattels
real; she is entitled in her own right
during the term, whereas the husband
may only be entitled during coverture
so that there is scarcely one of the qual
ities of joint tenancy. The husband's
right to the wife's chattels real in Eng-
land does not depend on joint tenancy
& therefore may subsist here even tho'
joint tenancy does not prevail. This is well
settled in this country. & If the hus-
band cannot devise away her choses
in action neither can he these chat
tels real; he may however make a lease
of them to commence after his death,
but in order to bind her he must do
it bona fide for a valuable consid-
eration, because this consideration
benefits the family. Suppose the hus-
band lease the wife's term & die, to
whom is the rent to be paid? The
term would go to the wife, but still
the rent to the executor. The rule
is the same if he lease the interest
for part of the term, because this
Cro. Eliz. 287. is a disposition pro tanto & the hus-
Moore. 343. band has a right to dispose of her term.
Co. Litt. 351. The rent does not follow the reversion
1 Roll. 344 Plow. 418. in terms as it does in freeholds. If
the wife is possessed of a term for
years & marries an alien he cannot
10 Mod 104 dispose of it, because the policy of the
law forbids his having any interest
in

Baron & Feme

in lands. It has been made a great question whether a term in trust for the wife, not to her sole & separate use, is governed by the same laws. Whether the husband has the same right to it as if the wife had the legal title. The rule is now established that he has, unless it appeared it was for her separate use, or intended as a provision for her after his death.

2 Ch. Cas. 76
1 Bulst. 118.
Cro. Eliz. 287.

A wife before marriage conveyed her estate in trust for her use, not sole & separate; & the husband did not interfere, but she took the rents & took bonds also for the profits — Did these go to the husband as admr. or in his own right? In his own right. And J. R. thinks this correct, tho' there were some cases which hold a contrary doctrine.

1 Vern. 7.18.
Hob. 3.

There is a species of choses which may be levied on for the husband's debts, which is mortgages.

1 Vent. 257.
Prec. Ch. 418

If a feme sole have chattels real & is dispossessed of them before marriage, and the husband gains no possession of them during coverture, they will go to him as admr. & not in his own right. J. R. thinks where this doctrine relating to possession does not prevail, as in many of the States, they will go to the husband absolutely. The transmission of estates in those States does not depend on actual seisin or possession as in

Co. Litt. 351
352.
Shower 282
1 Atk. 92.
2 Do. 67.

Baron & Feme

as in England, the legal are insufficient. In some of the States the doctrine of possession is actually exploded by statute, & in some impliedly. The difference between the rules of possession in England & in U.S. frequently occasions embarrassments at the Bar. Ownership alone is sufficient & seisin & possession not necessary. If the wife be possessed of chattels real as executrix, the husband is not entitled to them at all.

2 P. Wms 834.
3 D° 11.
1 Bro. Ch. 264

The next consideration is what rights has the husband to her Real Estate? The rule is the same as it respects his right whether the estate is in fee simple, fee tail or for life. Of these he has the usufruct during coverture at least. This is an estate for life because it may last during life & has no determinate period: The wife still has the fee as before coverture, therefore an injury done to the inheritance entitles the wife to an action, but one done to the possession entitles him alone. On the death of the husband the wife is again entitled to her real property, but the husband's executors are entitled to emoluments if there be any. If the wife die first the estate in fee descends to her heir, but her right to take possession may be post-

Co. Litt. 351

poned

Baron & Feme

spouse during the husband's life, if he had a child born alive of her which would have inherited the estate, the interest during his own life at all events is called tenancy of courtesy. The child must be such an one as would have inherited the estate. This will always be the case when the estate is one in Fee Simple; but when in fee-tail special it may be otherwise. The wife too must have been actually seised at C.L. during coverture, but in this country in many states seisin is not necessary, but ownership alone is so. — There is a tenure in England called Gavel Kind, in which it is not necessary that the child should be born. In Pen. by charter, all lands are gavel kind, but here females take as well as males, but courtesy has not been altered from what it was in England — yet it has been settled on the Common Law principles, perhaps inadvertently, but J. R. thinks it too late to question it now & supposes the birth of a child is necessary here notwithstanding the provision of gavel kind. — It has been a litigated question in England whether a man could be tenant by courtesy of a trust estate, to which all the modern authors say 'yes', that

Doct. & Stud. 203
3 P. Wms 229
1 Atk. 607
2 D° 47

is

Baron & Feme

1 Kz 298—

is of a trust estate not to her separate use. A woman leases her real property for rent & then marries; the husband is entitled to the rent in lieu of the usufruct. If he die with rent in arrear accruing during coverture, it will go to his executors. The rent in arrear accruing before coverture is like any other chose in action, which he must at common law reduce to possession during coverture; but in England a Stat. of Henry VIII gives it absolutely to the husband; & when tho' a chose in action it will go to his ~~ex~~ecutors after his death.

Of the interest which the wife acquires in the husband's property by marriage.

She can acquire nothing during coverture but what will inure to her husband. She may, however, hold property to her sole and separate use; but this is not by operation of law. On the death of the husband the law makes a provision for her out of his estate. If the husband die intestate, she is entitled to one third part of his personal property after the payment of debts. If the husband have no issue she is entitled to one half. These proportions depend on the Statute of distribution which which is adopted in terms in most of the States. The husband may devise away his whole personal property if he please. For her right depends upon his dying intestate of some part of his property at least.

Paraphernalia. These are of two kinds.

t.

1. Her bedding & cloathing suitable to her condition in life; and this kind is absolutely hers, which can neither be taken for the debts of the husband nor be bequeathed away from her by him.

2. Jewels & ornaments of any kind suitable to her condition in life. This kind is considered the property of the husband in some respects. It may be taken for his debts, & he may dispose of it during coverture, but he cannot bequeath it away on his death: in that event it vests in her sui modo. The executor may take it to pay debts, but not till all the personal estate is exhausted. This kind of paraphernalia forms no part of her dower under the statute of distributions. The executor has no more right to take them than a stranger, unless it be necessary, & the wife has abandoned them — they then belong to the first occupant. The wife holds this in exclusion to any volunteer whatever as legatee, & she is sometimes a creditor to the husband in respect of this paraphernalia. 3 Atk. 395

Suppose the husband mortgage it, he can dispose of it absolutely if he pleases & though her right is defeated, but this is not the case when mortgaged; after payment of debts she is entitled to redeem it out of the husband's personal funds. Suppose there be real estate devised for the payment of debts, the construction in England is, the [illegible] that this cannot be sold till the personal fund be exhausted. If the wife's paraphernalia be taken to pay, in such case, she will have the same right to resort to the

3 atk. 370

Baron & Feme

to the lands devised to be sold by filing a
Bill in Chancery, as any creditor could have
done in a deficiency of assets. i.e. She is
creditor to the heir for the amount of
the Paraphernalia thus taken from her.
The rule is the same where real estate is conveyed
in trust for the payment of debts,
whether the conveyance be by deed or
devise; she is a creditor against the husband's
land in this case as in the former against
the heir. In England specialty creditors
may resort to the land tho' not devisable
for the payment of debts. In this case if
such creditors resort to the personal fund
3 Bl. Com. 80 & exhaust it, & the wife's Paraphernalia is
1 Atk. 369 taken for the payment of simple contract
1 P. Wms 429 creditors, she has the same right to resort to
2 P. Wms 541 the lands as the bond creditors had in the
first instance. She can resort to the heir
for the amount of her Paraphernalia
if the specialty creditors could have resorted
to him for so much — she stands in the place
of such creditors. In many of the States
real property is a fund for a right to dower.
The issue of the wife might inherit an estate
of inheritance of the husband, except
in some cases estates in special tail.

It is not necessary that the wife should have
had a child in order to entitle her to Dower,
as she must have had by the husband to
entitle him to Courtesy. The Fem. therefore
is entitled to Dower in such estates only
of which the husband died seised. He
cannot however devise it away, to bar
Dower, nor make any conveyance in the

nature of, or operating as, a devise. The husband may however bar her during his life by a voluntary conveyance. From this form it follows in Conn. & wherever the law prevails, the husband is not obliged to join the wife in any conveyance he makes during coverture of his real estate. In Conn. too the Court of Probate appoints three persons to assign the widow her dower by metes & bounds, the heir having nothing to do in this assignment. —

It is said the wife of an alien cannot be endowed. The truth is an alien cannot hold land & consequently there is nothing of which she may be endowed.

The wife's right to dower may be barred

1 By elopement with an adulterer. If the husband receive her again, this will restore her right of Dower. —

2. By Jointure — which is a contract between husb and wife before marriage to bar dower. A jointure must be of real property & not of personal. It must be created in such a manner that she will be entitled to the enjoyment of it, immediately after the coverture is at an end. It must be also a competent livelihood of which the Court & jury are to judge. — She will not be holden if she have made an improvident contract, tho she was sui juris when she entered into it. This results from the care which the law takes of her interests under circumstances of this peculiar nature, when it is not uncommon for her to be improvident. — It must be a freehold at least, i.e. during the wife's life

Baron & Feme

life. It must be made to the wife or to another in trust for her. It must also be declared in the instrument to be in lieu of dower or it will not bar it. The wife in such case would be entitled to both, but such settlement would be a purchase of her choses in action.

A jointure is sometimes settled on the wife after marriage. If it be done in pursuance of articles entered into before marriage it will bar dower, otherwise not. But the wife may have whichever she will tho' she cannot have both.

There was anciently a method of endowing the wife of personal property 'ad ostium ecclesiae'. Such property was absolutely the wife's & the husband had no control over it. But this mode is long since at an end, supposed to be so by some statute unknown now. Suppose the husband devise the wife a legacy in lieu of dower, if this be expressed to be in lieu of dower, the wife cannot have both. But suppose he devises one third of his real property to her for life,
3. Atk. 8. but does not say "in lieu of dower," can she have both? J.R. knows not how it would be determined, but he thinks on principle she ought to have both. The practice in Conn. he says, is to set off her dower as if no devise had been made. If the devise were of a certain parcel as of 30 acres she would be entitled to both. Upon the whole J.R. thinks justice is generally done by giving the wife in these cases only her one third.

Prec. Ch. 37 Suppose the husband conveys his lands

[illegible]

absolutely or only in mortgage, the wife & [illegible] is not barred in any case unless she join in the deed of conveyance. If she join in the mortgage she may redeem by paying the mortgage money if the heir neglect it. Her proportion of it is only one third but if the heir neglects to redeem, she may pay the whole sum in which case she can retain all the land until the heir pays her two thirds the sum she has advanced. When she does this he is bound to pay her nothing but the principal, because the use of the use of the land which the widow has is equivalent to interest. Such is the English law and probably, says Mr. R. that of the States generally. It is a general rule that whoever has a life estate, dower, grant or otherwise may with his chance of a long life must pay one third part of the sum in order to redeem the mortgage.

If the husband mortgage the wife's jointure with her consent she may abandon & resume her right to dower. If she retain her jointure she may redeem it & hold it till they indemnify her the whole sum. On her death her executors may hold it also till the money paid by the wife be repaid to her executors, because the sum paid by the wife is altogether for the benefit of the husband to reinstate her rights as they were before the mortgage was made. There is one rule of the English Courts of Justice which seems to revolt the minds of the Chancellors, tho' they think it too well established to get over it, i.e. the wife cannot be endowed.

Sarah
Jane

Baron & Feme

1 Cha. Ca. 27.
1 Atk. 606.
2 P.Wms. 156.

endowed of an equity of redemption. If she cannot it would seem to follow that the wife of the mortgagee may, but she certainly cannot. Sir J. Jekyl determined that the wife may be endowed of an equity of redemption, but the Judges would not consider it law & it is now otherwise settled to the regret of all Lawyers & Judges. Notwithstanding this the Husband may have Curtesy in an equity of redemption, and J. R. conceives, if the question should arise in U.S. A. where they would not be shackled by these decisions, they would determine that the wife may be endowed of an equity of redemption, because it is completely real property & therefore principle would require it. They would not respect the English decisions because all English Lawyers disapprove of the rule. In Con. one case has decided that she may be so endowed. The wife of the mortgagee cannot be so endowed on principle, because the mortgage is mere personal property, i.e. security for money lent.

5 The Husband's Right to Property accruing to the wife during Coverture and also his right to damages for injuries done to the wife's person during the coverture. —

To real property he has the same right as if she possessed it before marriage in every respect. If a legacy be given to the wife without any thing denoting that the donor gave it to her separate use; or if she receive any thing under the statute of distributions — or if per-

Baron & Feme

of personal property be given her any other way, as a bond, note &c. all this belongs to the husband absolutely and not as admr. If he die first, they go to his executor & do not survive to the wife. These rules, however, are questioned. By some they are considered like any other choses in action. It is not, however, denied that the husband may sue alone, yet these persons admit that he could not sue alone for her choses in action. If she die first, J.R. has never heard it denied that they would survive to the husband absolutely & not as administrator. But they would contend if the husband die first they will go to the wife. J.R. admits this has been decided upon high authority but it was evidently a misapprehension in the Chancellor of the cases he cites do not support him. It is laid down however in Comyn's Digest as J.R. conceives correct. If they be the wife's property how can the husband sue alone, & how can he take it by survivorship as absolutely his own? If this be law the symmetry of it is marred. The rule is the same if a promise be made to pay the wife for services ren- by her; it belongs to the husband absolutely, because he was entitled in his own right to the wife's services. The elementary writers say husband & wife are one, and therefore he sues alone, but says J.R. if both form but one person, both of course should sue. Such figurative language, he observes, tends to misleading. So they say the wife's existence is suspended in law during coverture; if that be the case

2. Vez. 676.
2 P.Wms 417 & 97.
1 Com. Dig. 555.

Baron & Feme

case a promise made to her could not be sued upon even by the husband, because the promise was in the eye of the law, made to nobody.

Yelv. 89.
1 Roll 360.
Cro. Jac. 501–536.
Cro. Car. 96.
1 Salk 119.

His right to damages for injury done to her person during coverture, or to her reputation? This is the wife's property & will survive to her, if not reduced into possession by the husband. He may join her in a suit for them, & indeed he cannot sue alone. If she die, however, the action is gone because it dies with the person, & neither the husband nor his representatives will be entitled to it.

1 Salk 206
1 Levinz 140
1 Sid. 346.
Cro. Jac. 501.
2 Roll. 556
1 Show. 97.

The wife is entitled to smart money because from injuries of this nature two actions arise, one to the wife for injury done to her, & one to the husband in his own right for the injury per quod consortium amisit, or till the polished reign of Charles 2. called per quod servitium amisit. In this action the husband may give in evidence to increase the damages the expenses he has incurred in consequence of the injury done to his wife. If too, the wife acquire property during coverture by any skill of hers, the husband is entitled to it, as if for the reward of her services, which in fact, it is.

The husband has a right of action of trespass vi et armis for any injury done to the wife's person which violates the marital rights. The action in form is vi et armis tho' the wife consent, as in seduction or adultery.

Baron & Feme

ery, because the wife is considered to have no will; yet in truth it is an action on the case for seduction & the grounds for damages are 1. the alienation of the wife's affections: 2. The ridicule it throws on the husband: & 3. its tendency to impose on him spurious issue. The old cases would always give damages, but the modern ones give none when the husband is privy to the seduction. Here he sustains no injury & if the party has committed a public offence, let him be publickly punished &c. Again says J. R. he will be entitled to no damages when the husband & wife live separately on articles of separation for any adultery committed with her subsequent to the separation. The ground here, as alleged, is that the husband's marital rights are not infringed because he has renounced them in this respect by the articles of separation. These circumstances will defeat a recovery, others only tend to lessen the damages — such as the wife's character being in some degree depraved before the adultery. In this action it is remarkable that the husband must prove the marriage to entitle him to damages for adultery — it cannot be inferred from circumstances.

Bul. N.P. 27.
1 T.R. 651
5 T.R. 357.

4 Bur. 2057.
1 Bl. Rep. 637
Bul. N.P. 28.
Bates vs Barton
to orig.

The Husband's power over the wife's person. — This at the present day is very uncertain. Formerly it was thought

Baron & Feme II

thought he might chastise & confine her as
he would do a servant. This right is still
claimed by the vulgar, tho' it is doubtful whe-
ther it would now be supported in England.
Wives are treated with more consideration
since the reign of Charles II a reign
productive of much evil & some good.
The husband may seize & bring back his
wife if she have eloped with an adul-
terer; if he ill-treat her, the Court
will not take her from a friend to
whom she has flown for protection.
In this case the husband attempted
to seize her in the street & on habeas
corpus brought, the Court let her
go where she pleased.
The husband may confine her to pre-
vent her destroying or wasting his
property, and restrain her if insane.
He may beat her undoubtedly in his
own defence, & their relation prevents
an action's being brought by either.

The Husband's liability for the
wife's debts & duties before marriage
considered more particularly —

By marriage he is liable for the wife's
debts & duties, if collected during cover-
ture, but this liability does not depend
on any property received by the wife
as before observed. The debt must be col-
lected during coverture or the husband
1 Roll. 351 & his executors are discharged; but the
3 Mod. 186 wife herself is still liable, tho' she
3 P. Wms. 409 have no property. The debts of the
feme sole on her marriage is not con-
sidered

Baron & Femme

secured as transferred to the husband since then he would be liable at any rate & could not be discharged at the termination of the coverture. The ground of his liability is not that the wife is disabled to pay her debts, by coverture; because then she would not be liable after coverture unless she had some property — But the true reason is, says J.R. that she could not be imprisoned alone. There are, however, cases when the wife may be taken without the husband = E.G. when the husband is pursued, but if he escape she must be discharged. If the wife & husband are arrested on mesne process, she may be discharged on common bail if her husband has been discharged on bail; but if the husband obtain no bail the wife must go to prison too. i.e. for her debts, unless she can procure special bail. If husband & wife be both sued for a battery committed by both & the husband be acquitted, the wife must also be altho' the verdict would have been against her. If execution issue against husband & wife, the wife may be detained a reasonable time alone while they are endeavoring to apprehend the husband, but if unsuccessful she must be discharged. The wife is not to be imprisoned without her husband on any mesne process whatever. — This is a governing principle. — When both are prosecuted & the husband is acquitted

2 Stra. 1167.
1272.
1 Wils. 124.
Barnes' Notes
96.
2 B. 720.
1 Mod. 49. 51.
1 Sid. 395.

quitted she must be also, because execution cannot issue against her alone.

Baron & Feme

If the husband when confined with the wife break gaol, she must be discharged in a reasonable time unless the husband be retaken. — But the moment this coverture is at an end, this liability of the husband ceases. If she be sued before marriage execution may issue against her in her maiden name & this is the only exception to the rule. It is a general rule that the debt must be collected against

1 Sid. 337.

the husband during coverture. There is one case where it may be collected after, but it is no exception to the rule. viz. when husband & wife have judgment rendered against them & she die execution may issue against him

1 P. Wms 249. 257

notwithstanding coverture is at an end, because before that took place the debt had become the husband's own by the judgment. —

Of the Husband's liability for wrongs committed by the wife before marriage. — He is liable to answer in damages if collected during coverture, because he took her cum onere. So far it is precisely the same as with debts; but in case she die before damages are recovered the husband cannot be liable as adm^r. as he would have been for her debts not

1 Leon 312
1 Roll. 6.

collected during coverture. "Actio personalis moritur cum persona" is the rule in all personal torts.

And

sued for wrongs committed after marriage. If the wife commit any by the husband's order or in his company, she is not liable but he alone, because it is considered the husband's wrong & done by his coercion. It will therefore not survive against her, if the husband is liable in his own right. This is the only case (i.e. between husband & wife) in which coercion can excuse a wrong. If a servant commit a wrong by his master's order, both are liable. If the wrong was not committed in his presence but against his will, she is liable & consequently the husband is liable also on her account during coverture, but not after. It is precisely the same as a debt due before marriage by the wife. 1 Roll 257 Leon. 122 Cro. Car. 376

How is the Husband affected by offences committed by the wife against society? If the punishment is only a fine, the husband is as much liable as for a debt of his. The process is in fact civil. If however, the punishment be imprisonment or corporal, the husband is not liable, but the wife in this case may be imprisoned alone. If she be fined for a trespass, riot, or other offence, as she may be or punished otherwise at the discretion of the judges, he is not liable for this fine. The distinction is, between a penalty which 11 Mod. 68.

Baron & Feme

which is inflicted expressly by the law and a fine which is imposed (at) the discretion of the Court. In the former case he is liable but not in the latter. In the last case she may be confined alone for the fine —

It is a general rule that whatever duties were incumbent on the wife before marriage, the husband is bound to fulfil during coverture. A widow is bound to maintain her children if she have property. In case she marry, the husband then is bound if we preserve the symmetry of the law, because the wife was; this is perhaps a question but the principle is clear. If these children have property to maintain themselves, they must use it for this purpose. If the wife were not liable before marriage because the children had property or she had none, the husband will not be liable. There is an exception to this rule of maintenance which is reciprocal between parents and children, & that is when a man marries a woman possessing property, who is liable to maintain her poor parents; altho' she was liable before marriage & the husband take her cum onere, yet he is not liable. The rule probably is, says J.R., to preserve domestic tranquillity of which the law is very tender — I can discover no other principle.

1 Stra. 190.
+4 T.R. 118.

+ This was a case whether the husband was bound to maintain the wife's child by a former marriage. The Court determined he was not on the authority of the case in Strange that he was not bound to maintain his wife's parents. J.R. thinks that cannot be an authority

for

Baron & Feme

for this case, because it is a general rule that the husband must discharge the duty incumbent on the wife before marriage. It was incumbent on the wife at C.L. to maintain her child, but not to maintain her parents – this liability was imposed on her by Statute. The (C.L.) duties of the wife necessarily go to the husband by marriage & J.R. does not know a single exception. He excused from this duty imposed by marriage, from the reason of the policy before marriage. The case in [illegible] held the husband liable after the coverture was at an end, to maintain the grandchild of the wife. He was liable during coverture on the general principle; but this case is a departure from principle. If the wife commit a crime (not a tort) under the coercion of the husband is she liable? Never, when the offence is mere malum prohibitum, nor for any offence however atrocious, if solely against property, even tho' it be capital as theft or burglary. The wife is liable for any offence if she [illegible] both actual or presumed coercion of her husband. But it is said this privilege does not extend to cases which would have been offences in a state of nature, as in murder or treason. The wife is liable in one case when under the presumed coercion of her husband & that is when she keeps a brothel. The wife cannot be an accessory after the fact for any crime whatever committed by the husband. She may be accessory before the fact as the case may be. This exemption from being accessory (after the fact)

extends

1 Sel. 114.

1 Sid. 114.

1 Hawk. 2. 3.
1 Hale P.C. 456. 457.

Pagen Fime

extends to no other civil relation. The husband however, may be an accessory after the fact in an offence committed by the wife. J.R. thinks the old law of allegiance from the wife to the husband has had its influence in settling this law

There are certain contracts entered into by the wife in which he is bound & she is not. It is an indisputable rule that the wife may be attorney to her husband as well as another; in such case the contracts are those of the husband only on the principle qui facit per alium facit per se. He is also bound when the wife enters into such contracts as it has been usual for her to make & him to ratify
1 Sid. 128 & this upon the same principle as when his servant contracts & he discharges the contracts. No matter what the nature of the articles may be he is bound by her contracts. In the third place he is bound by such contracts as it has been usual by the custom of
1 Roll 350
1 Sid. 120
Stra. 345 the country for wives to make. When a wife purchases at a merchant's articles proper for herself or children. These articles must be adapted to her station in life — not extravagant or superfluous, nor such as women do not generally purchase, as oxen &c. —

A fourth kind is when the wife purchases any article no matter what, & the husband use it — here he is bound to fulfil the contract at the price agreed upon by the wife. This goes upon the ground either that the husband authorized it, or else he has received the benefit & must pay the consideration. —

Another

Baron
&
Feme
H

Another ground on which he is liable is, when he is unable or disqualified from contracting himself — the contracts of the wife will then bind him from necessity, as if the husband be absent from the realm or be a lunatic, the wife must conduct the affairs of the family & the husband's concerns; and in such case a contract for a yoke of oxen or anything else necessary to the husband's business.

Ibid. 127.

The husband is also bound when the wife contracts for necessaries in such articles as are proper for her situation in life. He is here bound on the ground of duty & not on that of consent. Hence if he should prohibit all the world from trusting her if she live in his house or she depart for reasonable cause, as abuse, she will bind him by her necessary contracts. The husband is only bound to maintain his wife at home unless she give him sufficient reason to quit him. If she quit him without cause and he refuse to receive her back, he in that case will be bound unless she have eloped with an adulterer. Then he is not bound to receive her; but if he do receive her this restores her right to bind him again for necessaries. There is one case in the books which says, if she elope with an adulterer & contract for necessaries and the seller is ignorant of her elopement, because it is not a matter of notoriety that the husband is bound. J. R. thinks there are insuperable objections to this. A master will be bound by his contracts, when the servant has quitted him, unless the seller has acquainted with this circumstance

Stra. 647. 706.
6 T.R. 603

or it,

it was a matter of notoriety. R. thinks
Baron & Feme the case of the wife cannot be supported.
The fact of adultery alone will not discharge
the husband if he continue to live with
her. She must elope in order to discharge
him. In the case in Bosanquet & Puller
instead of the wife's leaving the husband,
the husband left the wife & she remained
Bos. & P. 227. in his house with his children. In such
case would the husband be bound by
her contract for necessaries? The Court put
the case upon this point, if the seller
knew the circumstances of the wife's situation,
the husband would not be bound,
if otherwise, he would. I have before mentioned,
if a wife elope with an adulterer,
6 Mod. 171. she forfeits her dower, if he receive her
again her right to dower is restored.
It is common in England for husband
& wife to separate on mutual agreement.
Is the husband in such case bound
by her contracts for necessaries? A bare
separation without articles will not discharge
the husband. But if they separate
on articles & have a separate maintenance,
1 Salk. 116. 117. the husband, says J.R. is not bound
4 Burr. 2177. by her contract for necessaries. It is said
3 T.R. 12 if the wife be turned out of doors by
Marshall v. Rutton. the husband, he may notwithstanding
forbid a particular person from trusting
6 Mod. 171. her, but he cannot make this prohibition
2 Show. 283 general, or by it put the wife to much
inconvenience. There is a question of
much importance in England, on which
there have been various opinions, i.e. if the
wife purchase necessaries & then sell
instead of using them, shall the husband
be bound? J.R. thinks on principle
he ought to be bound, because
the wife was authorized on the supposition

Baron & Femme

position to make the contract. It was therefore good when made & it is not the duty of the seller to see that the wife do not abuse the confidence reposed in her by her husband. If the vendor knew the intention of the wife, then indeed the husband ought not to be bound. Salk. 118.

The wife cannot bind the husband by a deed, unless properly authorized so to do, even in those contracts which she is empowered to make. 6 T.R. 176.

There is another question, suppose the wife borrow money to purchase necessaries & actually does purchase them, there is a case in 6. [illegible] Reports or in Salkeld, that the husband is not bound at law tho' he is in equity. If the wife be committed to prison for a crime who is to maintain her? It seems the husband is not bound.

Salk. 387.
1 P. Wms 133.
Hutton 105.
1 Mod. 128.
2 Vent. 155.
1 Lev. 445
1 Ld R. 1006
2 Equ. 16.
2 Str. 1022.

I shall now notice the debts due from the husband to the wife at the time of marriage; also such as become due during coverture & those which are to become due after the coverture is at an end. Those due before coverture & those which become due during coverture are on the same footing. They both belong to the husband by the marriage — like any other chose in action they are reduced into possession & become his, i.e. they are as much reduced to possession by the marriage as the case will admit. If the bond &c. be not to become due till after coverture is at an end, on the death of the husband it will survive to the wife against the husbands executors Co. Lit. 351.

executors, i.e. if they are entered into in
contemplation of marriage as a pro-
Baron & Feme — vision for the wife & her children in case
she should survive him. There was never
any doubt that this was binding in equity,
but very much disputed at Law, and
now it is settled to be binding at law. The
Com. Rep. 67. — objection was, that the marriage neces-
Cart. 512 — sarily discharged the bond, because
× Hob. 216. — there can be no contract between hus-
× Ld R. 215 — band & wife. In the two cases in the
2 Ven. 480. — margin, the two Chief Justices, Lords
Holt, & Hobart, thought that the bond
was discharged at law by the marriage
but the puisne judges in both cases
decided differently. It has at length
been settled in the case 5 T.R. This
debt has always been considered one
of a superior nature, for on application
Finch R. 232 — to Chancery, has been decided to be
paid before any other debt.

Where the wife has a separate provis-
3 P. Wms 268 — ion made to her on marriage by the
husband, she does not forfeit this by
an elopement with an adulterer; she
only forfeits such rights to maintenance
as the law creates for her, not
those made by the parties.

Of Conveyances by the Husband to the Wife.

A conveyance of personal property
would be nugatory because he has
a right to her personal property ab-
solutely, but a conveyance of real
property to her is good, because she
can hold this in her own right. —
Such conveyance, therefore would be
good before marriage. But it is said
the husband & wife cannot contract

during

feme covert because they are one person in the eye of the law, but they are evidently considered as two persons for many purposes. That the conveyance of the wife to the husband should not bind her, there is good reason, which is being presumed under coercion. But why cannot the husband convey to the wife? She evidently has a capacity to take, because if a stranger convey to her she can hold. This maxim that they are one has prevented him from making a direct conveyance to her, but he may make a conveyance to A who may reconvey to her. Since the statute of uses in England he may make a conveyance to her in England by one deed giving it to A. to the use of his wife. Where therefore the statute of uses prevails in the States, the husband may make a conveyance to his wife by one deed, otherwise two are necessary.

Baron & Feme

Co. Litt. 112. 187.
2 Roll. 788.
Plow. 111
Dyer R. 116

Property either real or personal may be given to the wife as her own gift, or limited to her sole & separate use. These words are not necessary to be made use of in the conveyance, but any which denote the intention that it shall be to her sole & separate use will be sufficient. In the case in P. Williams the husband gave to the wife all she could clear from selling eggs on his farm; by this mean she accumulated £100 & lent it to the husband; on his death it was decreed to be paid to her by his executor. — No executory promise to the wife will bind the husband.

3 P. Wms 337.
1

Chattels

Baron & Feme

On articles of agreement to live separately, between husband & wife.

(I do not) know how far this law is adopted in U.S. but I think it must prevail in some shape eventually. It seems where there is a bare parol agreement to live separately the parties are not bound, but the marital rights still subsist. The agreement I allude to is entered into by articles, where the husband covenants to live separately, he is bound to the extent of his agreement, let it extend to whatever of the marital rights it may. If he renounce his right to her person he can bring no action for an injury done to her, or for crim. con. with her. If he renounce her property, he cannot claim or collect it. He is bound to the full extent of his covenant however extensive, but no farther. If he merely covenant to live separately, he only renounces his right to her person & any property she may acquire by her personal services, but he does not renounce her property.

3. Mod 22

A settlement of property on the wife on articles of separation, is merely voluntary & does not affect the interest of creditors. If the husband covenant to let the wife have any legacies accruing to her during coverture, she can have them to the exclusion of his right. If he covenant to renounce the usufruct of her real property she may convey such real property without joining the husband. The only reason why the husband should join is, to convey his interest, i.e. the life estate to which he is entitled, but

in a

Baron & Feme

in the case supposed the husband has no interest & therefore he may not join.

(2) The cases in the margin shew that the husband cannot compel the wife to live with him, when he has agreed under articles to live separately. She however can compel him to pay the maintenance which he has covenanted to allow her. It appears also by the case in East, that if the husband make a provision for the wife's maintenance, on the contingency of a separation, the wife can compel him to pay it. This perhaps has a tendency to promote a separation, & yet it is considered valid. Tho' many objections might be urged against this doctrine yet, says J.R., the security given to an innocent wife against the extravagance & brutality of her husband more than counterbalance them. — It has been determined that if the husband allow a competent maintenance to his wife he cannot be sued on her contracts. It has also been determined that, in such cases she may be sued as a feme sole. Nothing but the mutual agreement of the parties to waive the articles, can discharge the husband from this liability.

1 H.B. 346
Stra 478
2 Atk. 511.
1 Burr. 452-497
542
1 Vern. 386
Prec. Ch. 614.
496. 3 Bro. Ch.
Cas. 614
2 Ea. 283
2 Vent. 217.
2 Vern. 671
2 Bro. 384
2 Vern. 386
Prec. Ch. 447
Stra 478
2 Atk. 511
3 Atk 847
2 Bro. Ch. 90
3 Do 649.

Of Contracts by which the wife may bind herself. — It is agreed by all that she may bind herself by some contracts. J.R. thinks the doctrine introduced by Lord Mansfield was not a new one; but

Baron & Feme

but only applied to new cases. He says
it is frequently observed in the books
that this doctrine has been overturned.
He denies it, & says it is still a questio vex-
ata & tho' the cases were meant to be over-
ruled yet in fact they were not. It is
a general rule laid down that a wife cannot
bind herself in her contracts. We
will examine the grounds of this disabil-
ity. They are generally acknowledged to be
two. viz. the husband's right to her person
& therefore she shall not deprive him of
her company by subjecting such person
to imprisonment. The second ground
is the wife is considered in law under
the coercion of her husband, & then
for on her own account it will not let
her be bound by such contracts. T. R.
therefore admits these two rules, that when
the wife's contract will deprive the husband
of her person, or when the contract was
made under his coercion, the wife cannot
be bound by it. But if you remove
both these grounds, viz. the marital rights
& presumed coercion, I have no doubt says
1 Vez. 315 — T. R. but she may bind herself by her contracts.
Many cases have been decided in support
of this doctrine. If the husband be
banished the realm, the wife is bound
Co. Litt 132. — by her contracts for the above reasons.
Roll 400 — This case has always been admitted to be
Moor 556. — law & I think demonstrates that mar-
riage in itself is no disability. The books
indeed say that the husband is (civiliter
mortuus) but I see no sense in this reason,
if he were considered dead, she might
marry again but it is confessed she
cannot

cannot in this case. It has been delivered as an opinion by the Court that the wife of an alien enemy may contract. This is to extend the principle from the last case & has never been contradicted. Afterwards it was determined & has never been disputed that the wife of a man transported for seven years may contract. In these two last cases, says J.K. it was never contended that he was civiliter mortuus. Since these determinations it has been made a question whether the wife living separate from her husband with separate maintenance on articles of separation could bind herself by her contracts. On this question there is great diversity of opinion & also many decisions that she does, which have attracted much animadversion from the soundest lawyers, but, says J.K. if we examine the case in Term Reports, the principle we shall find that the husband's marital rights were not infringed, nor was the wife under any presumed coercion of the husband. Some lawyers have contended that the ground of this decision was the wife's having a separate maintenance; but if so the case was rightly decided on a wrong ground. The true ground is the articles of separation. A separate maintenance merely discharges the husband but does not render the wife liable, or at any rate she would only be liable on that ground to the extent of such maintenance.

It cannot be denied says J.K. that these decisions are opposed by many great lawyers & some judges have attempted to overthrow them; but the case did not call for a ju-

Baron
&
Feme

Sid. 116 a 60
Comb. 402
1 Ld. R. 147
2 Salk. 646

1 Bro. Ch. Ca. 368

1 T.R. 5 Corbett
v. Poelnitz.

2 Ky. 1143

11

a judicial decision, & J.R. thinks the prin-
Baron & Feme
ciples he advances are correct & it is not
yet settled otherwise in England.
The first case of a contrary doctrine was
the case in Blackstone in which a married
woman was sued – she plead her cover-
ture – the plf. replied her elopement from
her husband, & a separation from him,
2 Bl. 1079. & that the articles were furnished the wife
since the elopement upon her credit. It
was decided the coverture was a bar, but
says J.R. this case only proves where there
is an elopement without articles of separa-
tion the wife cannot bind herself because
she would then affect marital rights. The
next case in Blackstone was a separation
with a separate maintenance, but there
2 Bl. 1095. are articles of renunciation of the mar-
ital rights. In this case says R. I admit
that the separate maintenance will only
discharge the husband from being liable
but does not defeat the marital rights &
therefore she cannot be sued alone. The
next case was in Term Reports – it was an
1 T.R. 766. action of assumpsit brought against a
married woman for goods sold & deliv-
ered – she plead her coverture – the rep-
lication was, she lived in a state of adul-
tery & goods were furnished subsequent
to that & yet the plea prevailed. Because
says J.R. then the marital rights again
subsisted, there being no covenant.

The next case is in 5 Term Reports
5 T.R. 676. which differs from all the rest. The husband
& wife separated, without articles, & a suit
was depending as to the legality of her
coverture. The wife plead her coverture; &
the circumstances abovementioned were
stated in the replication, & the goods were
furnished

furnished on her own credit. The demurrer to the replication was holden good, & the plea of coverture prevailed, because the same reasons still subsist there. In the next case in 6 Term Reports L.K. says little affecting the subject. The wife separated from her husband & made a will – the cause of separation does not appear, but she set up a trade as being independent of her husband, yet says L.K., the husband was still entitled to the profits of her labour, & therefore the legatee could not claim under her will to defeat the husband's rights.

Baron & Feme

6 T.R. 604

The great case on which so much reliance is placed is the one in 8 Term Reports which, it is said, settles the doctrine if the others did not. But suppose it expressly opposes the other cases, yet it is only one case against many, & those too, decided by some of the greatest lawyers in England. I only wish to prove that the question is not yet settled – not that it is settled as I contend it ought to be. But says L.K., this case is not opposed to those on which I rely. If indeed those were decided on the doctrine of separate maintenance, this is opposed to them; but if, as I believe, on the articles of separation, this case may stand with them. The case was this: the husband & wife separated & the husband covenanted to allow her a separate maintenance while she lived separate from him, but there was no covenant which defeated the marital rights, therefore says L.K., I think this case supports my doctrine. To the general rule that the wife cannot contract to bind herself

8 T.R. 545.

Baron & Feme

herself, there is an exception. She may convey her real property, by joining her husband, because in this case she does not affect his marital rights. In England the wife can only convey by fine & recovery, but if she joined her husband in a deed it did not bind her. But in U.S. as we have no such modes of conveyance & therefore there the wife may convey by joining her husband in a deed. But in England, if she join in any other mode of conveyance except those above mentioned, the conveyance is absolutely void, if she wish to render it so. There is an exception made by statute by which she can join her husband in certain kinds of leases without fine or recovery.)

12 Mod. 161. Suppose the wife when levying a fine
joins her husband in covenants of warranty,
is she bound? This is or has been a
question, but she ought to be as much
bound by the covenants as by the fine. Suppose
2 Vern. 225. the wife covenant to levy a fine, is
she bound to do it? This has been a great
question but it is reasonable she should
be & the cases support her liability. Suppose
the husband does not join the wife in the
conveyance, is it good? She certainly cannot
defeat his marital rights & therefore
1 H. Bl. 346. he may set it aside; but the wife is bound
1 Vez. 229. by it unless he disagree — if he do he renders
(Co. Litt. 3. the conveyance by her alone void. Why
is it they are joined in the conveyance
of the wife's property? The husband
does not join to convey the fee
because he does not own it, but to
convey the usufruct & his right to the
courtesy.)

Baron & Feme

courtesy. She joins to convey the fee &c because it is her own. In all these cases the husband's consent is necessary because his interest is affected; but where no right of his comes in question his assent is no more necessary than that of a stranger. The husband covenanted to join her in her conveyance, but did not, & the Court determined that he had abandoned his right to control her conveyance, by his covenant.

If the husband's interest is the ground of the wife's disability, why do we not suffer subsequent conveyances of the wife to take effect after the husband's interest is determined? The reason, says T.R., is a stubborn principle of law, that a freehold cannot be made to commence in future. Remove this maxim & you remove every objection to her ability — this maxim never yields, therefore it avoids her sole conveyance. Another objection is, if it cannot be conveyed as a present estate, it may be made by way of remainder: after the husband's life, remainder to C. D. in fee. The reason is says T.R., another stubborn maxim that every particular estate must commence by way of remainder which it supports. In the case put, the particular estate of the husband commenced with the marriage, therefore the remainder subsequent to the marriage infringes the maxim. ——

Several States in the Union have abolished the maxim that a freehold cannot commence in future — the other maxim consequently falls with it. In these States things, says T.R. I see no reason.

Payne
& Eme

reason whatever, why the wife cannot convey to take effect after the husband's interest shall determine. Deeds & wills in this respect are placed on the same footing in law.

(Real Property after comes to the wife during coverture) Suppose the husband should dissent to the receiving it, can she receive it notwithstanding? When this question was proposed to me says J.R. I thought many cases might be found on the subject; but after the most mature search I could find nothing but the general principle that the estate accruing during coverture vests in her. Still the question remains, will his dissent divest it? If she make an actual purchase, in the common sense of the term, he may defeat it, as the cases have decided it, & says J.R. I see no difference when the estate is devised to her, or accrued by any other mode of technical purchase.—)

The principle is different when it descends to her because this does not depend on a contract, & the law only sets aside her contracts if the husband dissent. The general principle is still supported, because the wife cannot affect his rights by her contracts.—

Of the wife's executing a power of attorney.—— There is no question but she may in another's right independent of her husband— when it is a mere naked authority she may do it. But there has been a question whether she could execute a power over land vested in her, to be executed on a contingency. Here there is something more than a naked authority.

Where she is a mere trustee, she may execute

a deed

a will, in performance of the trust, whether she may or not in other cases. — If land be given her to dispose of to whom she pleases, she may give it to any one, even her husband, & this either by will or conveyance. No one denies that she may execute a mere naked authority whether given before or after marriage, with or without the consent of her husband. — But the question is can she execute a trust to convey lands on a contingency? Hargrave one of the most eminent lawyers of England, says she can. The husband, he says, can receive no prejudice from the act, but others may receive great prejudice if his assent were necessary. A Court of Chancery may compel (her) but, J.R. cannot see how it can compel him, because he has no trust nor interest on which Chancery may found a jurisdiction. The moment the condition is performed the wife is a mere trustee & I give it as my opinion that the wife can convey without his consent. I admit there is a difference of opinion among the judges, tho' the Court decided with the opinion of Hargrave. As a naked trustee all admit that she can convey, but, they say, before she becomes a mere trustee, she has an interest, i.e. before the performance of the condition. But what difference does it make that she has had an interest, when she becomes in effect, a mere trustee? —

Hazan v. Heme

W. Jones R. p. 133. 137.

I shall now consider what will be the operation of a conveyance by the husband of the wife's real property. He can not

Baron & Feme

not pass her fee but it will bind his own interest, because omne majus continet in se minus. The rule would be the same tho' she should join in the conveyance except it were by fine.

The next thing is the power of the wife to waive her contracts after the coverture is determined. If a conveyance be made to husband & wife she may waive it after coverture, tho' the husband had assented to the conveyance. His assent will not bind her when she becomes sui juris. The same rule regards a lease to husband and wife, in which case she may waive the possession. If the wife join with the husband in such conveyance as does not bind her at all, (for such there are in England tho' none in this country,) she may waive it if she pleases; but, if she accept rent from the tenant, it will be an affirmance of the conveyance. This could not be if the position so often laid down in the books were correct, viz. that the conveyances, contracts &c. of a fem covert were absolutely void. When they are absolutely void, she cannot affirm them by any means whatever. Whenever, therefore, her assent will render any contract or conveyance valid, it is merely voidable & not void. All these contracts respecting real property are voidable only. If the husband die & she receives the rent, it affirms the lease. But suppose there was an arrear of rent at the husband's death does it belong to the wife? It is answered yes. The principle is not at first perceptible. If the husband had leased it alone, his representative would be entitled to it on his death; but, she is entitled to such rent in arrear, where she joins him in the lease, by the principles of joint tenancy & in such cases only. — The husband is otherwise entitled to the rent in lieu of the usufruct. When no joint tenancy prevails, as in this country, his representatives should take it. But the wife may agree to any conveyance after her death which was made to them during coverture; if she do it renders her liable for all the charges due upon it.

Baron & Feme

1 Ro. abr. 349
Co. Litt. 26.

I will now consider her being released from the payment of rent accruing during coverture by virtue of a contract made by her before coverture. — Shall she be bound to pay the rent accruing during coverture? By marriage the obligation to pay it is transferred to the husband during coverture & she is discharged from it for the same time. On the husband's death his representatives must pay it & not the wife & thus by mere operation of law a man is obliged to change his debtor, to which there is nothing similar I am sure in any other part of our Law. This, undoubtedly is justified by policy & justice it merely for the singularity of the principle. The husband is undoubtedly entitled to the interest in the land & it is common for assignees of a term to be bound for the rent. But this is the only case where the lessee is discharged. Both the lessee & assignee in all other cases are bound. If a contract be made to the wife to take effect after the coverture is at an end, this, tho' a chose in action the husband cannot release. — As i.e. A. contract with B. that if she will marry C. he will pay her $5

1 Roll. ab. 357
3 R. 6.
1 Lev. 25

Baron & Feme

P. £1000. after the coverture is at an end. the husband cannot release it because he has no interest in it.

There is another contract which the husband cannot release, which is annually settled upon the wife during her life. He is entitled to the usufruct but as it is a corporeal hereditament, he cannot release or convey it more than any other real property. The husband's negligence to perform certain acts incumbent on the wife during coverture relative to her estate, may sometimes defeat her interest. As if the estate be given her on condition & the husband neglect to per-

Co. Litt. 246 form that condition, she is perhaps unable to perform the condition, as if it be to pay money, the estate is defeated. But his neglect to perform any condition, which is implied by law & not arising from any express agreement of the parties will not defeat her interest. Suppose in England, the husband should undertake to sell the wife's estate during her

Co. Litt. 246. 133. life, in fee simple. To sell a greater estate than one is entitled to is generally a forfeiture; but such a sale by the husband of the wife's estate, is no forfeiture.

When the husband is bound to join the wife & when he may sue alone tho' she be the meritorious cause of action. The cases do not exactly tally, but one principle runs thro' all of them. If the husband wishes to reduce her choses in action to possession he must join her. When she is the meritorious cause of action he may sue alone or join his wife. What effect

has

Baron & Feme

out her joining with him, as if for a trespass done to her lands. If he die before it is collected it will survive to the wife. But when her person or property is not the meritorious cause of action, he can no more join his own wife than his neighbour's. Whenever it will survive in favour of the wife she must join in the suit — when it will survive against her, she must be joined with him as defendant. —

When the husband must join his wife & when he may join her or not at his election. — And also those cases where they must be sued jointly. The principles I stated yesterday & I shall now only advance cases to support them. — If husband & wife be ejected from land belonging to the wife, both must join in the action, because it will survive to her on his death. Any contract made to the wife before marriage must be sued upon in the name of both — as a bond or note — also any injury done to her property before marriage, as trespass on her lands, or injury to her personal property, person, or reputation — in all these cases the wife must join in the action, because the injury accruing before coverture, the action would survive in her favour. And an injury done to her person or reputation during coverture will survive to her, & therefore she must join. The rule here laid down I consider as unyielding & has no variation. The husband in such cases cannot sue alone, tho' some inaccurate writers hold otherwise, & some judges have inadvertently

1 Bulst. 21
1 Roll. 347.
(20 Eliz. 537.
1 Sid. 25.
Cro. Car. 419. 490
Yelv. 89.
1 Roll. 306
Cro. Jac. 501. 588)

Baron & Feme

ently supported this doctrine. When the wife's
person or property is the meritorious cause
of action, altho' the action is his exclusive-
ly, yet he may join the wife or sue alone
as he pleases; in such cases, says T.R. I con-
ceive the action will never survive to the wife
tho' some make it a question. The principle
I advance is, the husband can never sue a-
lone when the action will survive to his
wife. When property accrues to her after mar-
riage, as a legacy it vests absolutely in the
husband & will not survive to the wife. —

3 Lev. — The case of Howell vs May is cited to prove the
Allen Rep. 36 husband may sue alone in any case; but
2 Lev. 107. there the cause of action accrued during cov-
erture. The case in 2 Lev. is, that where prop-
erty is taken from the wife before marriage
& converted after, the husband may sue
alone, because the conversion was done to
the property of the husband. The next case,
2 Vern. 365. in Vernon, is cited to prove that the husband
3 Atk. — 21 may sue alone for a debt due to the wife
before marriage, but this was a case of a
legacy accruing to the wife during covert-
ure. 2 & 3. Atkyns is also cited, but T.R.
says it does not relate to this subject.

The case of Rosforth vs Bradley in Vezey
2 Vez. 676. is most relied upon; but so far from proving
this, it proves that it will survive to the wife
2 Mod. 217. & that he must join her in such cases. But
holds wrongfully that property accruing
during coverture, will survive to the wife
when the case is otherwise. He also says
the husband may sue alone in this case
this is true but he could not if it would sur-
vive

Baron & Feme

come to the wife. Why may not a feme covert sue alone to recover her choses? All agree she cannot, but I wish to ascertain the true principle. Some say she has not existence, but this is mere metaphorical nonsense. If she do sue alone it can only be taken advantage of by plea in abatement – this proves the unsoundness of that maxim. This suit by her would not hurt the husband because he is entitled to the money if she collect it. If he die before collection, she would be entitled to it, & so she would had the husband joined in the suit. Some say the coverture is disqualification & this is the principle I wish to combat. If it were so coverture need not be pleaded in abatement but might be taken advantage of at any time. They also say her existence is suspended during coverture, but the contrary of this is shown in a multiplicity of cases. The true reason is it would be unjust to allow the wife to sue, when she cannot be liable for costs, having no property if she be defeated, & her person cannot be taken because it would infringe the marital rights. The husband must also be sued when she is, because in order to get the wife's body the husband's must be taken also. His property is liable for the debt not hers because she has none. When she is the meritorious cause of action & an express promise be made to her, she may be joined in the suit – and why not for the same reasons when the law implies a promise? Where an injury is done to the possession of her lands &c the husband may join her or sue alone. If the wife had leased her lands before marriage, by the marriage

3 T.R. 627.

4 Mod. 156.
1 Salk. 114.
Cro. Jac. 77.
1 Roll 348. 347.
3 Lev. 403
1 Ven. 82.

1 Bulst. 21
Palm. 207

Baron & Feme

marriage the rent belongs to her husband in lieu of the usufruct & therefore he may sue alone, yet he may join his wife for the reason above mentioned. There is one case where he may sue alone for the recovery of a debt due before marriage, viz. where rent is in arrear at that time, the husband may sue alone tho' it would survive to the wife. But this is given to the husband by the express Stat. Henry VIII.

Cro. Jac. 205. 442.
1 Vent. 62.
Cro. Jac. 399. 438.

The consequence arising from joining the wife when the husband is not obliged to, is to give her the judgment by survivorship if the husband die before execution. It is said she takes it by the jus accrescendi; if so where there is no principle of joint tenancy, the judgment will not survive to the wife, or rather she would be trustee for the executor of the husband. J. R. would himself incline to this opinion, as the wife does take on the principle of jus accrescendi, i.e. this alone will give it to her. But he thinks there is another ground on which she may claim it, & that is, that the husband intends she shall possess half of it, therefore it is considered as given the wife by the husband if she should survive him before the debt or damage is collected. This I conceive is the principle which is to support the wife's claim, even where the jus accrescendi does not obtain; but it is only considered a voluntary gift & may be defeated by the husband's creditors. There are cases where the husband may not join the wife, tho' the action accrued to him by or through her; those are

Cro. Jac. 501
1 Salk. 206
1 Leo. 140
1 Sid. 346

are where he brings an action for special damages, as per quod consortium amisit, or for slander against the wife. It is said the husband cannot join the wife where the action is absolutely his, tho' she be the meritorious cause of action, unless there be an express promise — An implied promise will not accrue to the wife but to the husband only. J. R. knows not the reason.

Baron & Feme

Brightz vs Addy
2 Vent. 195
4 Conct 151
1 Mod 156

Can any thing that belongs absolutely to the husband survive to the wife? J. R. conceives not, tho' there are opinions enough in the books to perplex the subject. The case in Croke James was when a cure was effected by the wife, they decided correctly that she might be joined but upon a wrong opinion that it would survive to her. In the case in Croke Charles an Estate was granted to the husband & wife for their lives, remainder to the heirs of the husband in Fee, the husband sued alone for a damage in not repairing — this was a damage to the inheritance & yet the Court said the husband may sue alone; so he might, says J. R., because by this conveyance, by an unyielding rule of law the wife took nothing. The rule of the King in Shelley's case, the wife took nothing because the husband took a Fee simple.

Cro. Jac. 77.

Cro. Car. 79

The husband & wife must be sued jointly in all those cases, where the cause of action would survive against her. The law in such cases considers the wife the person sued. If husband & wife enter upon land, claiming it as the property

of the wife, the action for the land must
be brought against both. She must be sued
Baron & Feme
with him for all debts she owed before coverture,
because the action survives against her
alone & not against the husband's executor.
If the wife die no recovery can be had against
the husband except as administrator
of the wife, when he has assets. The
wife in all these cases is considered the
debtor. If the action be brought for a wrong
committed by the wife before marriage, to
recover damages, both must be sued. As
to torts after marriage, if they were committed
by the wife by the command of
the husband or in his presence, the action
will not survive against her & he must
be sued alone. If it were committed by
1 Roll 6. 348 — her without any presumed coercion of the
Co. Litt. 351 — husband, they must be sued jointly for
1 Lev. 312. — it will survive against her. Suppose a
man & wife be both beaten, they cannot
join in action for the battery of both; the
husband must sue alone for his own battery
& they must join for that done to the
2 Vent. 29 — wife. The battery is governed by the
Cro. Jac. 665 — same principle as any other chose in action.
If husband & wife commit a joint
battery and are jointly sued if the husband
be acquitted the wife must be discharged,
tho' the verdict be against her.
— She cannot be taken on an execution
alone. The action should have been brought
against the husband & against the husband
& wife for the battery done by her,
then both might be taken for the wife's
battery

battery, if the verdict were against her, tho' her husband be acquitted for that committed by him. It is said that an action bro.t by husband & wife for a battery of both, if the defendant be found not guilty as to the husband, but guilty as to the wife, is a good action. J. R. knows not as there is any objection to this on principle; tho' the declarations have been abated when they jointly sue for a joint battery.

Baron & Feme

1 Went. 328

The next subject I shall consider is whether the wife have a power to devise. —

If she possess no property, she consequently cannot devise. But suppose she have property, is there any thing in coverture to disable her to dispose of it by will? We are not to look for any authorities in England on this subject, because she is disabled as to lands by Stat. 34. Hen. VIII. In Con. she is expressly authorized to devise. In some of the States the Statute of Henry is adopted, & here therefore there can be no question. The only question is when the Statutes of Wills is in affirmance of the Common Law. I shall consider this in two points of view, first without authorities, second, with them. As to the first I should think she could when no marital right of the husband is affected by such disposition — this is the principle which governs universally. And as to the authorities, they all support this principle, when no right of the husband will be affected she may dispose of her own property by will. Formerly there could be but few cases of devises of lands by wives, because devises were not allowed by Common Law, but only practiced under some remains of the Saxon customs. She may undoubtedly devise her separate personal property; can she her real? Not in England, because she is disabled by Stat. of Wills. How is it in the States where this statute is not adopted? In Con. there was formerly a decision by the Superior Court that she could not, but this was reversed by the Court of Errors. For some time it was considered settled that she could, when a case decided by the Superior Court that she could, because the Judges all considered the law settled, yet now the Court of Errors decided that she could not devise. A statute was consequently enacted to enable her to do so. How was it, at C.L.? I will consider it on principle & then on authority. Some contend that at Common Law, whenever the wife had property which was capable of being devised & by which the marital rights of the husband were not affected, she might devise.

Some say marriage is a disability. I see nothing in marriage alone of that nature — So again, they say she has no will; but the law recognizes a will in her to commit a crime. — Again, they say she would devise under the coercion of her husband, & he can influence her conveyances as much & yet she is enabled to make them. I shall make no observation as to the imaginary guard of the English law to examine the wife privately

Baron & Feme

privately when she conveys – There can be no shadow of security in it. Why then may she not devise as well as convey? at least with the consent of her husband? But I contend she may devise without such consent. The reason why she cannot convey without the consent of the husband is, his rights would be affected if she could convey in presenti & she cannot convey in futuro or by way of remainder for reasons before mentioned. But she may devise to commence in futuro, & therefore the devise would be subject to the marital rights & could not in any way defeat them. —

I will now examine the subject on legal grounds. If she devise the husband's personal property with his consent, ~~it~~ Devise is a good one — his assent is necessary because the property is his — all allow such devise is good. Glanvil & Bracton, two of the most ancient English writers, lay it down that the will of the wife generally is not good, because, say they, his interest would be affected. This then would not be authority when the husband's interest would not be affected. Besides if she could not generally she might in some cases. Bracton says she might devise her robes even without the husband's consent, because even there, it was considered her own property; & this he said was an exception to the general rule, and the reason why there were not more exceptions

Cro. Car. 219
376.
Brooks Dev. 34

1 Reeve His. 111. 307

3 Reeve. 9.

exceptions was because the wife at that
time seldom had property of her own. However,
when the wife was endowed ad ostium
Baron) Ecclesiæ, as formerly, of personal property
Femme) she could devise this alone. Archbishop Stafford
in the time of Edw. III lays it down that
1 Reeve 191. the wife might devise her own property. Lyndewoode
4 Reeve's 68. at a later period, the most eminent
civilian of his time, seems to be surprised that
any one should deny that the wife could
devise when she had property of her own
deviseable. The reason these civilians
urged was, that she had no property; but
if she have property, as she undoubtedly may
have, why not devise it alone? She can
not devise his property, it is true, without
his consent, tho' she may with it. In modern
times it is customary for wives to have
separate property on settlement. Lord
1 Vez. 180 or 190. Hardwicke recognizes the doctrine &
contend for & says, in all cases a wife
may dispose of her own property either
during her own life or by will. The same
principle was advanced by Lord Thurlow
1 Vez. 303. who says, the wife may dispose of her property
1 Vern. 204. 2 Vez. 45. as well as a feme sole, either by will
2 P. Wm 316. or other disposition. These authorities therefore
1 Pre. Ch. 10. establish the power in England, but
Prec. Ch. 205. they have been objected to as Chancery
1 P. Wm 126. cases, but a Court of Law will not recognize
2 Vez. 518. 3 Atk. 709. the principle. J.R. says the rule must
1 Vern. 253. be the same in both Courts, & Chancery
E.G. permits any one to devise who can by
Common Law, & in one case it decided that
a devise of real property was not good,
tho one of personal was. Why this distinction?

Because she was disabled from devising lands by Statute Chancery cannot enable her — But if the wife be disabled from devising personal property at Common Law, Chancery could not enable her for surely C. L. is as stubborn as the Statute can be? In Vesey it is laid down generally she may bequeath her own property without her husband's consent. If the wife were disabled from devising by C. L. the husband's assent would not remove the disability, for he cannot enable her to devise lands since the stat. under which disabled. — With respect to her choses in action if the husband survives she is not entitled to them therefore it would seem that according to these principles that she may devise things — it has been adjudged in Modern she may do so. Whether this right has been taken from her by Stat. 29 Car. II. which gives the residue of her property after payment of debts, to the husband is another question. I am, however, of opinion that the wife's devise would defeat this right of the husband — Wherever, therefore, she has property of her own, she may in all cases devise it without the consent of her husband unless she be disabled by statute. The above observations relate to personal property only. —

Baron & Feme

2 Ves. 76

1 Mod. 211. 212.

2 Atkison 92
1 Moore 340
1 Roll. 214
6 Co. 912.
2 East. 532

The Wife's devise of Real Property

All admit the wife's real property belongs to herself — she alone owns the fee; why then, it is asked, do we not see frequent devises of real property by the wife? Because by the Stat. 32 Henry VIII. no person could

Devises

Baron of Exxe

devise real Property, & by Stat. 34 of same
King, two years after, the wife was expressly
disabled. It is not, then surprising that
we find so few instances of the woman's
devising. How was it among the Saxons
before the Norman conquest? It is supposed that it was introduced among them
by the Romans; if so, they of course introduced the civil law. Now by this
law a wife could devise her real property.
It is well ascertained that the Saxons
practised devises about the Roman era;
the presumption is therefore strong that
married women could devise in the
Saxon age. This is a mere surmise, but there
are some fragments of the Saxon customs from which an argument might be
drawn to confirm this. Some of these customs were allowed to be preserved in Kent,
1 Roll. Abr. 315. & in some other places. In these we find
an instance of a married woman's devising notwithstanding strong objections were urged against it. In this
case, however, the husband's consent was
given to the will, but there was no observation by the Court that such consent was necessary. In another case
1 Leon. 18 in Leonard, her devise was held good
tho' there was no assent by the husband.
In the case in Henry Blackstone, the wife
H. B. 334 Comp. vs Collins was separated from her husband under articles — She surrendered her copyhold lands to the use of a will & it was held
good. A wife can surrender copyholds, notwithstanding the Stat. of Wills
has disabled her from devising. This takes
effect by the surrender & is not called
a devise

Baron Feme

a devise. But the only ground of the decision was that the husband's interest would not be affected by the surrender, 'tis therefore, an authority in a case of a similar nature. But arguments may be drawn from other quarters. It seems to have been anciently very common in England for a wife to make a will during coverture of her rationabiles Dues; this consequently could convey no interest if she died first; but such a will was considered operative if she survived her husband. If her will had been void, this could not have been the case, for since the statute of Wills, if a wife make a will during coverture & survive her husband (i.e. of her own lands) such will is not good because void in its creation. There is another Saxon custom 1 Mod. 123 Brooks Dev. 16 according to which, if it be the custom of a manor, a wife might devise lands to her husband. In another she could 6 y. of Edw. 3. & 3. D°— devise according to custom but not to her husband, because his coercion would be presumed.

Can the wife devise in those cases or States where no Statute expressly disables her? I have shewn that the wife could always devise, when she had deviseable property of her own, either real or personal. An argument has been urged that the Statute 34. Henry 8. is binding here as part of the Common Law, because in force in England before the emigration of our ancestors. But all such Statutes are not necessarily binding here. There is one exception — when we have a statute of our own upon the same subject, ours alone is operative on us

Of [illegible]
Feme

Ambler 527

upon us — not the English. — Now every State has such a statute as 32. Henry VIII, but it differs from the English & it does not expressly disqualify the wife. The Stat. of Va. is an exact copy of that of Henry 8. except alone the clause disabling a feme covert to devise. I apprehend then, the conclusion fairly follows that in those States where she is not expressly disabled the wife may devise. In the case in Ambler the husband covenanted to let the wife devise her real property, yet the devise was not good because the assent of the husband could not remove a disability which the law had imposed. The same Court however allowed that the husband's assent would enable her to bequeath her personal property. This shows that she was not disabled by law, else the husband's assent could not remove the disability.

Does marriage revoke the will of a feme sole? If it be of her personal property the will must be nugatory since there is nothing on which it may operate. But if there were, says Ro., I see no reason for revoking the will; because the wife was sui juris when it was made. If however, she marry & have children, this is a revocation, because it is considered a tacit condition annexed to the will, that it shall be void on such a contingency. If therefore the devise be of lands by a feme sole, who marries & survives her husband, such devise I should conceive not good, because she ought to have the liberty of revoking the devise, when the motives for the particular disposition are removed.

removed; as they often would be in a course of time.

Baron & Feme

The next subject is the wife's separate property. It is now perfectly settled that she may have such property. It may be given her either before or after coverture, & the husband has no interest in it. Formerly such conveyance was to trustees for her separate use; in this case any conveyance by her was good, unless it was provided in the instrument that the trustees must join her; in which case it is necessary they should. —

3 Atk. 695
Bunbury 147
1 Vez. 518,

But of late years it is not uncommon to give an estate directly to the wife without any trustees. Doubts were entertained upon it, but these doubts were overruled. Are any words necessary? Those made use of generally are "to her sole & separate use"; but any words indicative of an intention to give to the wife independent of the control of the husband, suffice. It was determined in the case in Brown's Chancery, that a legacy being given to the wife, "her receipt being a discharge" gave it to her separate use. Another was cited in this "her receipt shall be a discharge notwithstanding the coverture" was a case still stronger. Suppose such property be given to the wife without the intervention of trustees, can the creditors of the husband take it?

2 P.Wms 316

1 P.Wms 125. 316

take it? It is settled they cannot, i.e. unless
the husband was the donor. Suppose
a suit be brought for it, somebody must
Baron be liable for costs, & therefore a trustee
& Feme must sue, but the husband is a sufficient
trustee for that purpose. This is supported
by the cases in the margin. The husband's
gift to the wife will be good
Prec. 187. 205. & he is considered in Equity her trustee,
3 Atk. 399. except against creditors. If the
father of the husband give to the wife
on her marriage a valuable present
of diamonds, are these paraphernalia
3 P. Wms 334 or separate property? The latter
2 Vern. 659. — so decided the Court under all
circumstances. Articles of agreement
respecting such property have been
holden good. The idea I wish to enforce is this,
that no particular words are necessary to convey
to her separate use; the intention, however
it can be ascertained, is sufficient. As
3 P. Wms 144 to this separate property the wife is bound
1 Bro. Ch. 16 for her contracts in equity but none of the
marital rights can be affected by such contracts
— her property alone is liable. With
respect to this separate property she is treated
as a feme sole as far as it can be done consistent
with the husband's marital rights. Suppose
she advance this separate property to discharge
incumbrances on the husband's estate;
if nothing more than this be done it
is considered a gift to the husband. But
suppose she had taken a receipt of her
husband? She may retain the estate disencumbered,
till the money be refunded her.

She is considered as much a creditor to the husband as any other person; she herself can recover it of the husband before his death in such case. 1 Atk. 269. 2 P.Wms 82.

Baron & Feme

There are many cases where the wife agrees that the husband shall receive her separate property; in such cases if she conceive herself a creditor & there is evidence of it, the Court will treat her as such: they will not, however, consider it as a gift, if they suspect any coercion of the husband.

2 P.Wms 82.341

In the case in Peere Williams the wife agreed with her husband before marriage, that all her mortgages &c. should be assigned to a trustee for the wife's use; this was done, and for ten years the husband was allowed to receive the uses & profits without any enquiry made by her about them. The Court would not consider her a creditor for them. In one case the wife called in her separate property & put it out in the name of her husband. The Court considered it as a gift to him. But Ld. R. supposes she might have intended to consider him as her trustee for many legal purposes & that he might have been considered such. If a wife has a separate real property, she may dispose of it by deed. But suppose it be given to trustees for her use, can she convey the legal title? In form it seems she could not; but this is form only, for she can compel the trustee to do it. There is no doubt she can her personal property.

When the wife sues in Chancery for her separate property, she may sue in the name of the husband, but if he refuses, she may sue.

Baron & Feme

Es. Ch. 35.

sue by her prochein ami, who is liable for cost. If the husband sue, the property will appear in his name, but Chancery will always see that she or her trustees have it. When the wife is sued, it is brought against her; judgment goes against her, but execution can only issue against her separate property. If he have her separate property, she may sue him in Chancery for it.

Of marriage contracts by minors.

3 Atk. 607.
2 Lev. 146.
2 P. Wms 243.

Minors are of age to contract at 12 & 14. These are often holden good in Chancery, because they are incident to a contract of marriage. They are not necessarily good, but the Court will inquire if it be reasonable. These are often done with the consent & approbation of parents, who themselves make settlements; in these cases they are bound. The marriage is binding without such consent, tho' the person marrying is subjected to a fine where such consent is to be had. The Court will inquire into the reasonableness of these settlements by the minors & will set them aside if unreasonable. Had they been adults, this contract would have been binding. Contracts have been entered into between husband & wife before marriage, that the property which may be given her during coverture shall be to her sole & separate use. This contract is binding on the husband.

Of marriage settlements.

These are frequently on an intended wife & her issue, & are in reality voluntary gifts. In every other case a voluntary conveyance is fraudulent against creditors, but in this it is considered given for a valuable

consideration & is good against creditors.
But it must be reasonable & adapted to his
circumstances, if so it will be good, tho'
there were creditors at the time of the set-
tlement. There is one other idea on this sub- Baron & Feme
ject to be understood — If settled on the
wife & their issue, it avails against cred-
itors; but if settled on the husband and
wife & his brothers, when it comes to these
brothers it will not be good against cred-
itors. Therefore marriage settlements must 2 P. Wms 594
provide for the parties to the marriage Eq. Cas. Abr. 354
& the issue of it. If made for the benefit 1 Vent. 193
of strangers it will be considered volun-
tary in their favour. Marriage settlements
tho' made after marriage, will be as good 2 Ves. 18
as if made before marriage, if directly in Ambler 121
pursuance of articles before marriage.
If the husband after marriage receive
a portion by his wife & in consideration
thereof makes a reasonable settlement
it will be good as against creditors. So (Ca. Jas. 158. 181
if she have property in the hands of trustees Prec. Ch. 425
not to her separate use, he cannot have a Do 22
remedy for such property unless he make 1 Atk. 188
a reasonable settlement on her therefor. 2 Do 420. 477
Ambler 14
Marriage settlements made after mar-
riage unattended with the preceding cir-
cumstances are void against all creditors
for they are merely voluntary & the wife
himself is not bound by them in any respect 2 Bro. Ch. 148.
nor is the husband, for he may dispose of
them again for a valuable consideration.

We will now notice settlements made
on the wife on articles of separation for
her maintenance — these stand on dis-
tinct

Baron
Lee

distinct ground from marriage settlements. It is settled in England that such settlements are binding on the parties & the same rule probably prevails in U.S.A., or rather I know of nothing to the contrary. There has been a division of sentiment on this subject, in the Courts of Con., but upon the whole, the Court of Errors has recognized the validity of such articles for a separate maintenance. We are told the effect of such settlements is the discharge of the husband from the wife's contracts for necessaries. The separation is in itself a provision for the wife's maintenance, & J.R. sees no objection to this if it be a matter of notoriety. He also thinks a notorious separation alone without such maintenance will discharge the husband. He knows no cases to the contrary, but thinks the question open to discussion, i.e. the credit given to the wife must be voluntary & not from necessity. If the wife have spent her separate maintenance & comes upon the town, as the town is obliged to support her, the husband is liable to them, & therefore it is not the ground of separate maintenance that the husband is discharged but because a man is not obliged, unless he has been faulty, to maintain his wife away from him. Therefore a credit given to her knowing these circumstances must be on her own account & not on her husband's. In this case, as the husband allows her to live away from him, she is justified in doing it, but he thereby renounces no marital right, not even that over her person. This differs from

a marriage

Baron & Feme

a marriage settlement in this, that it is liable to creditors, while the other is not. The husband is not bound to support his wife who lives away from him by mutual agreement, even without a separate allowance, any more (in J. K's opinion) than if she had eloped from him, not with an adulterer, in which case it is clear he is not bound to maintain her. The wife may dispose as she pleases of such personal property settled upon her for her maintenance, but she cannot of real — of this she is only entitled to the usufruct in order to maintain her only. If the husband promise the wife during coverture, the promise if executory is not binding, but when executed it is good. The husband promised the wife for some consideration he would leave her a sum of money by will — He did not make a will but gave a bond to a stranger for the use of his wife — it was decided to be binding upon the husband's executors. Widows frequently, when about to marry again, have made settlements "to their separate use" in every case they have been holden fraudulent against the husband, if done without his knowledge. She however, may make a provision for her children by her first husband & it will bind the second.

1 Lev. 148
4 Co. Rep. 50

2 Vern. 17.

It has been often practiced in England for the husband to take a mortgage to himself & his wife, in all countries where the principle of jus accrescendi prevails, the mortgage will survive to the

Baron
Feme

to the wife. But where joint-tenancy does not prevail you must seek another principle. The question in this case may be doubtful but I believe that it is a voluntary conveyance & can therefore be avoided by creditors only. This J.R. conceives the true point of light, because he can see no other motives for the husband's joining her.

The next subject is the wife's mortgaging her lands to aid the husband. This is a common thing — In England it must be done by fine — in this country an ordinary mode of conveyance will answer. Suppose the wife only covenant to convey? J.R. thinks the authorities will warrant us to suppose that it will bind her. The authorities, however, favour both sides of the
1 Roll. 375. question. It depends on the old
1 Eq. Ca. Ab. Covenant question of marital rights.

2 Vern. 61. The effect of a mortgage by the wife to help her husband — A question has arisen whether the husband can take up a second sum upon the estate mortgaged without the wife's permission & have the mortgage as security. — J.R. thinks if the question were new the estate should not be security for both sums, but the au-
1 Vern. 41. thorities have decided that it is. — Suppose the husband die after she mortgages her lands, how can the wife redeem? The husband's estate shall be liable to disencumber it after payment of
1 Vern. 437. 1 P. Wms. 347. debts — She is postponed to all other creditors

Baron & Feme

creditors and is herself considered one. This right in her, however, to be considered a creditor may be repelled by shewing by parol evidence that she did not consider herself so. The operation of this evidence is merely to rebut an equity & not to control a written instrument the mortgage deed shewing nothing on the subject. If the husband's estate be under mortgage & the wife mortgage hers to disencumber it, the wife shall hold the estate disencumbered, till she is indemnified.—

I will now consider cases where the wife is mortgagee.— This is in reality a chose in action & not real property. — It is considered of the same nature with the money lent, of which it is security. — A settlement by the husband would be a purchase of this as much as of any other chose in action. The husband does not, however, reduce such mortgage to possession till he reduce the bond to possession. He can receive the money, but unless so he cannot convey the land. It will be liable, however, to be taken by the creditors of the husband.—)

Of the wife's settlement. — A person may have a capacity to acquire a settlement in many cases, but she can have but one. The acquisition of a new settlement defeats the old.— Whenever a woman marries, her place of settlement, is always the same with that of her husband. If he have none,

as a

Baron & Feme
11

as a foreigner &c. She gains none by marriage, & therefore the wife does not lose her old one. When a person has no settlement, the town in which he resides must furnish him with necessaries but they become creditors to the State to that amount. The wife cannot be sent to her own settlement during coverture, even tho' they become paupers, i.e. a wife cannot be separated from her husband. But if he run away & leave her, J. R. thinks she might be sent to the place of her settlement, tho' the authorities are divided on the question.

Burns Jus. 374 to 379

A marriage before the 26 Geo. II was legal, let it have been celebrated any way. But since that statute, unless a marriage comply with the prescribed forms, it is void to all intents & purposes, consequently gives the wife no settlement, however long cohabitation will be evidence of marriage.

Can husband or wife witness for or against the other? The rule says not. This disability does not arise exclusively from interest because in all such cases the opposite party may waive such objection & the evidence will then be received. But such waiver will not admit a wife's testimony. The true ground is, the law wishes to preserve domestic tranquility which such evidence will have a tendency to interrupt. However there are exceptions, by one of which a wife may be a witness in a charge of treason. T.R. does not find such a case, tho' he presumes there must have been. When one party is complained of by the other that he or she is afraid of his or her life, such party may be a witness on the complaint. T.R. supposes that it is from a principle of necessity that when a husband is prosecuted by the public for abuse of his wife, she may be a witness. Subsequent Judges have condemned the principle; yet a case in Strange called Azia's case has confirmed the rule. Since this case T.R. does not know that the principle has been condemned. It was objected to as a dangerous expedient, but the answer was, it must be admitted from the necessity of the case from the paucity of other testimony.

The right of husband & wife to justify a battery in defence of each other. — The rule is, — either party may do for the other what he may do for himself, both have the same justification in a battery committed by either. A woman has undoubtedly a right to take the life of her ravisher, so has he. He is not, however, justified in killing one whom he finds in adultery with his wife, since she has no such right. This however, may be the lowest species of manslaughter.

Of Marriages. In all well regulated governments some forms are adopted to give efficacy to this contract. The marriage must be celebrated, i.e. rendered notorious. I do not mean that it is necessary to its validity that the celebration be according to the form pre-

scribed

prescribed by law — this is the great question about which so much difference of opinion has been entertained. Previous to the reformation by Henry VIII, marriage was considered an ecclesiastical contract, & was celebrated only by the Clergy. At the Reformation the doctrine of its being a sacrament was rejected by the Protestants, who considered that it was a mere civil ceremony. The Clergy, however, were considered proper persons to perform the rites, tho' altogether in a civil capacity. Marriages were never before this time in a single instance celebrated but by the Clergy. At the Revolution they were taken from the Clergy & given to the Justices of the Peace. At the Restoration of Charles II they were given back to the Clergy. By 26 Geo. II all marriages not celebrated according to the forms prescribed by the Statute are absolutely void. Before this Statute then only can we collect [illegible] evidence of Common Law — there is no such Statute in U. S. — Suppose then here a person celebrating marriage who is not qualified, is it void & the issue bastards? One thing is clear, the person who performs the rites without being authorized is liable to punishment. But is the marriage itself void? I think such irregular conduct is not the ground of avoiding the marriage. Several cases in England before the Stat. Geo. II will give us some light. During the usurpation of Cromwell, a clergyman married when none but Justices of the Peace were qualified, & yet the marriage was holden good. After the Restoration marriage was restored to the Clergy exclusively, & yet, the Court of King's Bench granted an injunction against the Ecclesiastical Court, invalidating a marriage celebrated by a layman. Also Children were allowed to sue for distributory shares, which they could not do if the marriage had been void. These cases & many others afford irrefragable proof that such marriages were not void at Common Law. There is only one case opposing it & that was decided by the Ecclesiastical Court. In debt upon a bond by husband & wife for a debt due the wife before marriage, the deft. pleaded there was no legal marriage — the Court held the marriage legal, tho' not by persons duly qualified. In none of the Statutes that I have seen in U.S.A. have I seen one similar to that of Sec. 2. The assent of the Parents is necessary by the marriage acts, yet no one contends that the marriage is void without such assent. All that is necessary in the opinion of J.R. to constitute a valid marriage is, the assent of the parties duly evidenced in a serious contract. The age of consent is 12 in a female & 14 in a male — They may, however, marry at any age, but it is voidable by either party till the age of consent in both — both must be bound or neither. There is one thing more which has strangely involved a diversity of opinion (i.e.) a marriage under duress of one of the parties — some have held it void

Canon

II

1 Salk. 537.

1 Com. Dig. 545. where all the cases are collected

2 Salk. 437.

Keb. 473

6 Co. 22

7 Do. 43

Roll's abr. 340

Co. Litt. 33

void, others, good! It is astonishing, says T. R., that this most important of all contracts, should not be avoided by duress, which is the case with every other species of contract. I think it ought to be void.

Who may contract a valid marriage.

A Statute of Henry VIII declares all marriages within the Levitical degrees and all contrary to God's law, void. There is no difficulty in ascertaining what relations are within the Levitical degrees. Whenever, by computation of the civil law, collaterals are within the third degree, it is unlawful to marry. Any relation in the ascending or descending line, however remote, is within the Levitical degrees. The Courts have determined the following cases 1. A man cannot marry a second wife, the first living. 2. He cannot, where there was a prior contract to marry. This is now exploded. 3. In cases of imbecility. These marriages now, except the second, are never valid. In all such cases a divorce may be obtained, tho' it is not necessary in case of a second marriage. The Levitical Degrees include affinity as well as consanguinity. But blood relations of the husband are not blood relations of the wife, & therefore such marriages are valid.

1 Com. Dig. 597.
1 Roll. 360.
5 Co. 98.
Cart. 271.
Co. Litt. 235.

Divorces.

Where there are pre-existing causes, the divorce is "a vinculo matrimonii"— when the causes are supervenient, the divorce is "a mensa et thoro." — In the former case the children are bastardized after divorce, but never before; nor can they be for such causes after the parties' death. Where, then, a divorce a vinculo matrimonii, is desired for supervenient causes, the legislature only can afford it. In divorces a mensa et thoro the Courts have a power to allow her alimony for her maintenance. The consequence of a divorce a mensa et thoro only deprives the husband of his right to her person but no other marital right is defeated. The Con. divorces a vinculo matrimonii are awarded by the Courts for supervening causes; of course the issue are not bastardized, for the marriage itself was legal.

Baron
& Feme

1 Salk. 121 —
Cro. Car. 462.
Moore 665.

When the wife is divorced in Con. for her own adultery, she is not entitled to her dower; otherwise, if the adultery or cause of divorce be on the part of the husband. Here too, a man is authorized in one case to marry within the Levitical degrees & that is the sister of his deceased wife.

2

Master and Servant.

By

James Gould Esq

Master and Servant.

A servant is one who is subject to the personal authority of another a master is one who exercises such authority.

This authority is personal; subjection to civil authority is not servitude.

The authority exercised by the master, is generally, not always, by virtue of some compact between the servant or his guardian & the master.

In Con. there are six kinds of servants 1. Slaves 2. Apprentices. 3. Menial servants 4. Day labourers 5. Agents 6 Debtors assigned in service. The first & last of these kinds are not known to the Common Law.

1 B. 423
1 Maddison 464
Stat Con. 34
Salk. 666.

With regard to slaves it has been doubted by many whether slavery has ever been recognized in Con. Mr. Gould thinks it has. It is said if slavery

has been legalized in Con. it must have
been founded on the Natural, Common
(Master & Servant) or the local Law of Con. See Black-
stone on Slavery for arguments against
4 B. 123 it. II. The Common Law does not
allow any kind of Private Slavery nor
can the local laws of another country
Salk. 666. commanding Slavery be enforced in
England. A foreign Slave upon
landing in England becomes free
1 Inst 79. b he is protected in personal liberty, per-
Salk 424. 666 sonal security, & private property.

2 B. 94. There were indeed in England under
Litt. Text. 31. 89. 94. the feudal system, villeins; these were in
204. some degree slaves, not absolutely. But
3 Hume 307. at this time there are no such villeins in
2 B. 96 England as the feudal tenures were abol-
ished by Stat. of Charles II. It is clear
then that Slavery never existed in Con.
either by Nature or Common Law, tho'
Mr Gould thinks it has by local Law.
Stat. Con. 141. He knows not a Statute which author-
2 28. 33–96–99. izes Slavery, but there are many which
recognize it. Slavery has grown up
without laws authorizing it anywhere
but the laws which recognize it, prove
that it has existed.

Strict absolute slavery, however, has
never been legalized in Con. A master
has

has never had a right to kill or abuse his slave. It has also been determined by the courts here that a slave might receive & hold property, & for such property he might bring an action even against his master. It has been determined by the Supreme Court that the marriage of a slave by the consent of his or her master, is ipso facto an emancipation. By entering this estate duties become incumbent upon him which are inconsistent with servitude — this is the reason of the emancipation. So a minor who contracts any relation inconsistent with his obedience to his parent he is thereby emancipated from these natural trammels. This relation, however, must be contracted with the parent's consent. A neif, however, was not emancipated by the Feudal Law if she married a villein; but was if she married her master or a freeman.

Master
& Servant

2 H. Bl. 511. 356
3 T.R. 256.

Litt. 187
2 B. 93-94

It has been a speculative question whether an illegitimate child can be a slave by birth. It is contended that it may if the mother were a slave, for with respect to the father he is he is not known in law. Partus sequitur ventrem. The illegitimate child of a female slave, Mr. Gould conceives, belongs to her master. But slavery is now almost abolished in Con; and this is in a degree affected by Statute since children that are born after 1790 will be free at 25 years of age. Slaves cannot be imported by the Laws of U.S.A. There is hardly a slave now in Con. Thus much for slavery. It may be farther observed however that the wisest men have thought it just, that great offenders may be judicially condemned to slavery for crimes.

Master & Servant

2 B. 93. 94
Litt. 187–8

Stat. Con. 399.
400. —

1 B. 426. Apprentices. These are so called from a French word signifying to learn. The reason of this name is that they are generally bound for a term of years to be instructed by a master.

6 Mod. 182
2 Ld. R. 1117.
Salk. 68.
2 Ven. 64.
49 D. —

The contract of apprenticeship must at Common Law be by deed. A parol contract, therefore, is not binding, nor a written one, unless under seal. As apprenticeship cannot be binding unless by the performance of the above conditions, so neither can any kind of servitude. It has been said by Bacon & others that the word apprentice must be used in the deed &c. to create the relation; but it is now decided otherwise by the Courts. All other servants are bound by parol contracts. Mr

8 T. R. 379.

3 Bac. 546.
8 T. R. 379.
1 East. 534.

Gould

Master & Servant

Mr. Gould knows not the reason of this distinction, but supposes that the service of an apprentice being so very strict, it should be created with some solemnity. In England, the children of paupers may be apprenticed by the overseers of the Poor with consent of two justices of the Peace & the persons to whom they are offered must take them. This is by Statute, not by Common Law. The same law obtains in Conn. except the obligation to take such apprentices.

1 B. 426.

Stat. Con. 60. 348.

Apprentices are regularly entitled to no wages for their services; this is the presumption of law. The master, however, may give wages, if he please. Other servants, except slaves, are entitled to receive wages, & if there be no stipulation on this subject the law implies a promise on the part of the hirer to pay such wages. In England, the Sheriff of the county or the Sessions settles the quantum for husbandmen servants &c. But the quantum of menial servants is settled between them & their master. Infants may bind themselves by indentures of apprenticeship by an English Stat, tho' by no other contract. The apprentice, however, is not strictly bound by the covenants in an indenture, nor can the master prosecute for a violation of them. But if the father or guardian of an infant in an indenture

8 T.R. 279.

1 B. 428.

8 Mod. 190.
Doug. 501.
1 B. 426.
Cro. Jac. 497.
Cro. Car. 179. 448.
5 T.R. 716.

ure of apprenticeship join the infant
the father or guardian is bound by all
Master & Servant — the covenants in the indenture.
Doug. 500. 518. 8 Mod. 190.

In Connecticut there is no such Stat.
as 5 Eliz. & therefore a minor cannot
there bind himself by these indentures.

If a master abuse a servant or
1 Atk. 578. — apprentice, the apprentice may depart
1 Bac. 426 — from his master. This is implied by
law. An apprentice cannot be
discharged but by deed — eo ligamine
quo ligatur. This rule applies only
Ld. R. 1117. — when there is an agreement to this
Salk. 68. — effect. Cancelling the indenture with
6 Mod. 182. — the joint consent of parties, also discharges
Stra. 582 — the apprentice. It has been determined
in Con. that an agreement by parol
will also discharge. But under the Stat.
3 Day. 126. 1 Day. 153. — Law of Con. an apprentice may be
discharged by the County Court for
Stat. Cor. 294 — a default of the master. The master
by the same authority may correct
the servant for neglect of duty. A
master cannot assign over the ap-
3 Bac. 550. 1 Bl. 426. — prentice, by Common Law, to another
Salk. 68. — master, because the contract is per-
Doug. 69. 12. Mod. 553. — sonal or fiduciary. And upon this
Hob. 134. — principle, if there be a submission to
3 Keble 519. Stra. 1267. — arbitrament in case of difficulty, an
award of the apprentice to a third
person is not good. If a master assign
Ld. R. 638. — an apprentice to B, and the appren-
1 Salk. 68. — tice refuse to go, A is liable to B
Doug. 69 — for damages; if the apprentice, however

Master & Servant

however, consent, B. becomes master ipso facto, & the apprentice gains a settlement upon the same principle, a master cannot send his apprentice abroad, unless the nature of his business requires it. The executor of a master cannot hold an apprentice, but it has been holden that he was liable on the covenant of the master to procure him instruction. It is now, however, determined otherwise. Is the personal representative, on the death of the master, bound by his covenants to procure the apprentice necessaries? The current of authorities says yes. Mr Gould thinks not upon principle, since the executor can derive no benefit from his services.— It is common in England for the parent to pay the master a premium for instructing the apprentice; in such cases where the master dies during the apprenticeship, Chancery can compel the executor to restore part of the premium. The sum restored must be proportional to the loss of time which the apprentice incurs.

3 Bac. 555.
12 Mod. 446
Hob. 134. 135.
Stra. 1267
2 Ez. 36
Salk. 68.
Wats. Part. 296
Salk. 66
1 Lev. 177
1 Sid. 216
Cro. Eliz. 553
3 Salk. 41.
1 Keble 761.
820.

1 Vern. 460.
1 Atk. 149.
Finch Rep. 396

So also where the master has turned away the apprentice, the premium having been paid, Chancery has restored a proportional part of this premium. So in England where the justices can discharge an apprentice, they may also restore part of the premium. The service of apprentices is

2 Vern. 64

Stra. 582
1 Atk. 149.
3 Bac. 550
1 Bl. 426
Salk. 67. 490
11 Mod. 110.

strictly

stricter than that of other servants & the master is entitled to all that he may earn during his apprenticeship, and this applies as well to apprentices de facto, as to those of contract, or indenture. It does not, however, to other kinds of servants except slaves. Any property acquired during the apprenticeship may be recovered by any proper mode of action by the master against the apprentice &c. This action may lie on loss of services. This observation, however, only applies to property earned by the apprentices & not to that left or given to them. If an apprentice or any servant is enticed away from his master, an action on the case will lie against the enticer — So also of a journeyman. If a servant, however, be taken away by force the remedy may be an action of trespass.

Master & Servant

Stra. 382.
1 Burr. 117.
6 Mod. 169.
11 E. 48. 83.
3 Bac. 559-67
Cro. Jac. 657
2 Lev. 63
Salk. 68
6 Mod. 69
12 Mod. 415

Cowp. 56.
1 Woodes. 469.
3 Viner's Abr. 20

2 Ld R. 147.
Salk. 386.
Noy. 105.
2 T.R. 169
2 Ld R. 1032
(Cowp. 55.)

In England the apprentice gains a settlement where he served the last 40 days under the indenture. In Con. it is exactly the reverse. Hence if an apprentice or other servant of 25 years of age absent himself from his master, he is compellable to serve double the time of his absence, after his lawful time has expired. The master can also by process take him wherever he can find him. —

Stat. Con. 340
3

D°. 290.4

Menial Servants. These are so called because employed intra moenia. It is a rule in England that

1 B. 485
Fitzh. N.B. 168.

if

that if no specified time be fixed in the contract, the hiring is considered for a year. In Pen. there is no such rule. In England too, by Statute 5 Eliz. the servant cannot leave the master nor the master discharge the servant without a quarter's previous notice. The servant however, may be discharged without such notice by the Sessions, on reasonable cause.

Master
Servant

1 B. 425-6—

Day labourers. By common law there is no particular rule with respect to these, but by Statute persons having no visible effects may be compelled to work & have their wages settled by the Sessions.—

4 B. 426-7—

Agents are servants only in respect to the property of their employers & are under no personal control. The master has no such personal authority over agents as over other kinds of servants— They are only obliged to perform the duties stipulated by contract.

1 Bl. 427.
1 Woodd. 469.
Ambler 252.
19,738.

There are two rules. 1. Every factor broker or other commercial agent must strictly pursue his commission; if he deviate he is accountable for any losses. This, his own security and the law require.

1 Wood. 469

2. +A Factor may retain the goods of his employer in order to balance his accounts; if he once give them up he can

2 East. 227. 523
2 B. Rep. 1154
Amb. 254
1 Burr. 498
1 East. 335

+ A Factor is a foreign commercial agent he can never afterwards resume them. They are in his hands of the nature of a pledge. —

Master Stuart Cowp. 257. And if the factor has sold the goods to another, he can compel the purchaser to pay him the price & not to the principal. He has however no lien upon such goods unless he has the actual possession — 3 T.R. 119. 2 Vern. 117 1 Atk. 194. a constructive possession is not sufficient. — So a bill of lading appears to give possession of property but this is only constructive possession. If the principal please to stop the goods in transitu he may. —

If a factor gives more or buys less than the principal directed, the principal is not bound. Should the factor however buy more than is directed, 1 N.R. 510 the principal is bound to the extent of his direction only.

A factor cannot pawn the goods of his principal — in such a case the pawn is void. If the principal offer the balance he owes to the factor & the pawnee refuse to accept it, the principal may maintain trover against the pawnee. — He cannot pawn, because it is foreign to his business; and another reason, the trust to the factor is personal. A factor however may sell & maintain an action 5 T.R. 604-606 [illegible] 1178 1 H.Bl. 362 1 B.&P. 648. in his own name against the vendee for the price; this the convenience of Commerce requires & he has also a beneficial interest in the sale. This rule applies also to a shipmaster. he tho' not a factor, is now considered so. It has lately been determined that an auctioneer too, may maintain an action in his own name against the vendee, since the contract was made with him, & this whether the purchaser knew or not to whom the goods belonged. Actions, however, may in the above case be brought in the Principal's name. An auctioneer, however, is not liable even if he sells the goods lower than directed because the setting of the goods to sale amounts to a contract with the purchaser, that the highest bidder shall have them. If, however, the principal tell the auctioneer to set the goods up at a certain price, & then sell to the highest bidder, & the auctioneer set them at a lower sum, he is liable.

Master
&
Servant
11

(7 T.R. 359.
Cowp. 256
Bul. N.P. 130
1 Esp. Rep. 493
Paley's Prin. 403
1 H.Bl. 81.
1 Chit. 5.)

(Cowp. 395)

Attorneys are also servants of the fifth class & have a lien upon the papers of their clients for the security of their fees. They are permitted to compel the adverse party to pay over to them & not to the client the costs &c. The attorney's right, however, is subject to any equitable claims of the adverse party upon the client. An attorney who executes an instrument for the principal, must do it in his principal's name, otherwise he will be himself bound. No particular form, however,

(1 East 465
1 H.B. 24.122
2 T.R. 657.
2 D°. 440.587.
2 B. Rep. 826
Doug. 100.238)
4 T.R. 123
6 T.R. 456
Chitty Bills 24.27.56
9 Co. 76.
Str. 705. 955
L^d R. 1416.
2 East 142
Com. Dig. att^y
4 T.R. 313.
7 D°. 264.269
3 Bac. 405

however, is prescribed by law. An agent cannot bind his principal by deed, without authority given by deed. This rule however, is not necessary to be observed when the principal is present.

Master & Servant

There is a diversity between public & private agents. A Public Agent contracting for public affairs in his own name is not himself liable. The remedy of the party with whom the contract is made is against the public.

1 T.R. 172. 1 Root 89. 1 East 582.

Debtors assigned in service. These are unknown to the Common Law, but in Con. a debtor who cannot satisfy his creditor, may be assigned in service at the request of the creditor if the Court judge it reasonable. This assignment however, will never be made unless the debt were bona fide fair. It is generally made for the purpose of raising the amount of the debt & costs out of the debtor's labour, & must be for a determinate time. But in this case the authority given to the master is strictly personal & is not transferable, as in the case of Apprentices. These assignments are now very rare & unpopular. The Court by means of the condition in the Statute, which requires the assignment reasonable will, if they can, find some objection.

Stat. Con. 34

Rules

Rules with respect to masters and Servants generally.

In what cases the master is bound by & may take advantage of, the acts of the Servants. Those acts which are done by the master's command, either express or implied, are in law the acts of the master. All acts done by the servant in the business which the master has imposed upon him are binding upon the master — qui facit per alium, facit per se. Whatever is expressly commanded or permitted by the master to the servant is binding upon the master. A contract made with the servant as servant, as in the case of a clerk, is, in legal contemplation, binding upon the master; these contracts however are made relating to the business in which the servant is employed. So if a servant is a chattel of his master's property, the master may have an action against the wrongdoer. So if a servant be robbed of his master's goods in the master's absence, either may maintain an action. The reason why the servant may sue is, the servant may be considered as the depositary & has the lawful possession which he may defend against all but the owner. The reason given by some that the servant is liable to the master, is incorrect. In this case, i.e. of robbery the suit of the one bars the suit of the other. When the servant sues, he declares of these goods as of his own goods. This corresponds

Master
Servant
4

1 Bl. 429.
2 H. Bl. 442.

3 Bac. 559.
2 New Rep. 411.

1 Roll. 98.
Cro. Jac. 223

Salk. 613
3 Mod. 289.
4 Mod. 308.
12. Do — 54.
11 Do — 8.
3 Bac. 69.

1 Roll 165.
Cro. Jac. 265.

Latch. 127

2 Saund. 379.
3 Mod. 289.
Salk. 613.

corresponds with the reason which Mr Gould
gives. But if the servant be robbed of such
Master goods in the presence of the master, the
Servant latter only can maintain the action, because
&c. they are then considered in the
actual possession of the master. If the
Salk. 613. master's money be obtained from the
Carth. 145. servant by an illegal contract as in
1 Hawk. 148. gambling, or by fraud, the master
may recover it back by action for
money lent; but not if the servant
3 Bac. 559. squandered it without any fraud in
the case. If an innkeeper's servant rob
guests, the master is liable. This, however,
applies not to the servants of other
1 Bl. 430. hosts. So if an innkeeper's servant sell
1 Roll. 2. unhealthy food or liquors, & they injure
8 Co. 32. the health of the guests, the master
is liable, although he would not
1 Rol. 95. have sold them had he known their
1 Bl. 430. badness. It is said that the servant is
3 Bac 563 not liable in such cases. This might
Mr Gould thinks, sometimes lead to
dangerous consequences, for the servant
1 Wils ^{3}228 would not be liable tho' he should
sell wine &c with arsenic in it & thus
murder &c. A servant then is liable for
all unlawful acts even tho' commanded
&c by the master. But it is said that if
a servant do an act which he does not
know to be wrong, tho' it be so, & it be
1 Wils 328 commanded by the master, the servant
Esp. Dig. 580 585 is not liable. But if such act is committed
3 Bac. 563 by force, the servant is still liable
to the party injured, tho' ignorant
of the

of the wrongdoings. Suppose a master tells a servant that a certain piece of land belongs to himself & commands the servant to cut down the trees, if the servant does he is liable to the true owner. 2 Bl. Rep. 892

Master & Servant

All those acts not done by the master's command either express or implied, are not to be imputed to the master. A parent is not liable for the acts of a child, on account of such relation, but only when the parent's consent is presumed. The child here is considered a servant.

Skinner. 228
3 Salk. 282
1 B. C. 431

A clerk in a store, whose only business is in the mercantile line, contracts for a piece of land for his master, without the master's consent, the master is not bound, for the trust reposed with clerk never extended so far. It has also been decided in K.B. that when a servant commits a wilful injury in pursuing his master's business, the master is not liable, but he is if the act be committed thro' the negligence or unskilfulness of the servant. Mr Gould is satisfied of the correctness of this distinction — He feels yet cannot give his reasons. — If A's servant driving his carriage, wilfully overset B's carriage, the servant is liable, but if the upsetting be thro' negligence or unskilfulness, A is here liable, because the law wills that he hire careful & skilful servants. When a surgeon by an apprentice injured his wounds, the master was liable. This distinction between wilful & negligent torts has been but lately settled

1 East. 196.
1 B&P. 472.
Salk. 441.
1 Woods. 465.
1 East 106.
6 T.R. 125.
3 D. 648.
2 H. B. 442.
1 B. C. 431.
C.R. 739.

2 R.u 639.
1 Bl. 431

up by the King's Bench. We will give a short history of them. 6 T.R. 125.

Master & Servant

A servant wilfully drove his master's carriage against another. An action on the case was brought against the master — It was decided that the action would not lie because it was

2 H.Bl. 442,
2 New Rep. 449

misconceived — it should have been trespass. In another case of a similar act, of the servant thro' negligence, the action was brought for trespass — The Court said it should have been on the case. When a servant in a third case committed a similar injury wilfully it was decided that neither trespass nor case would lie against the master. It has been holden too, that if a servant hire another servant to do an act for his master, if the second servant do an injury thro' negligence

1 B.&P. 404
6 T.R. 411

the master of the first servant was liable — The master however may have an action against the offending servant. In such cases the action can only be brought against the master or offending servant. —

It is to be observed here, that when the wilful wrong of the servant amount to a violation of a contract subsisting between the master & the injured party, the master is liable. Perhaps there is no similar case in

1 H.Bl. 158
3 Bl. 165.
Ld R. 910.
Imp. Bail. 73-4

the books, but I think it follows from principles laid down there.

An under-sheriff is a servant of a

highsheriff & therefore the highsheriff is liable civiliter for the wilful torts of the under-sheriff; & for mere neglect or omission of official duty the high-sheriff alone is liable to the injured party. The reason is, the action is brot for breach of duty; the undersheriff is not known to the common law, & therefore he cannot be liable. But for positive torts of the undersheriff he as well as the highsheriff may be prosecuted. Here he is not sued for a breach of duty in this case, but merely as a wrong doer. So also if the undersheriff permit a voluntary escape, he is also liable; but not if the escape could not be prevented. Jailers, however, the constables &c are public officers & therefore may be sued in any case as the sheriff.

Master & Servant
4

1 Vent. 238
Doug. 42
2 T. R. 154
2 B. Rep. 832
3 Wils. 309
Esp. Dig. 603-13
Cro. Eliz. 349
Salk. 18. 441
Cowp. 406.

A Postmaster it has been decided is not accountable for the wrongs of his servants; he makes no contract with the bailor, but only with the government. He is also the servant of the government & therefore stands between his master & his government & consequently comes within a rule before laid down. He is liable, however, for his own defaults. When he takes too much, he is liable to an action of indebitatus assumpsit.

Ld. R. 646
Cart. 487
Com. Rep. 101
Cowp. 754-64
Salk. 17
3 Wils. 443
2 Bl. Rep. 906
Esp. D. 823
Cowp. 282

A master is liable for the acts of his servants done in pursuit of the master's business. This authority is either general or special — express or implied.

2 Vern. 543
Ld. R. 224
2 Salk. 234
6 Mod 109

A general authority to contract extends to contracts generally — a special is confined to one or more specific transactions.

Master & Servant

An express authority needs no definition.

An implied authority may be inferred from the custom of the master. This relates to general contracts. A special authority may also be implied, as when the servant makes a contract in the master's hearing.

3 Salk. 234
1 Shower 95.
1 B. Com. 430

Here it may be observed that if a master send a servant always with money to purchase necessaries, he is not liable for what the servant takes up upon credit.

Comberb. 450.
Chitty on Bills 26.

If, however, a servant buy articles without any prior authority either general or special & the master receive & then use them, he is liable, because he gives an assent subsequent, which is as good as a prior assent.

Esp. R. 224.
3 Salk. 234.
10 Mod. 110.
3 T.R. 760.

Suppose, however, a master, having given no prior credit to the servant, send him with money to purchase an article & the servant keep the money & get the article upon credit, is the master liable? Doubtful.

3 T.R. 760
Peake's Rep. 42. 154.
10 Mod. 109
12 Do. 346
Chitty on Bills 26.

A master may discharge himself, when he has permitted a servant to buy upon credit, by giving a prohibition as public as the credit given to the servant. So also is he bound for the contracts of the servant even after their connection is dissolved, if this circumstance were not known at the time at the time of making the contract. —

Master & Servant

If the servant in selling his master's property make a warranty of it, the master is bound by it, unless there be an express restriction. And when the servant acts within the scope of a general authority, a private restriction, if it be not public, notwithstanding, the master is still bound. — But if a servant warrant a horse contrary to the master's command the master is not bound by it, because this is not in pursuance of the master's business & the buyer had no reason for trusting to the servant's warranty, since the master had never authorized the servant in such business. — The concealment of a known defect in an article sold amounts to a warranty by the seller.

Salk. 289.
4 T.R. 177.
Stra. 653
1 Esp. Rep. 111.
Esp. Dig. 630.
3 T.R. 760.
10 Mod. 109.

2 Roll Rep. 5.297
Esp. Dig. 629
2 Swift 120.

It is laid down in the books, that if a servant, by the command of a master, sell an unsound horse without being directed to sell him to any particular evidence person, the master is not liable; he is, if the horse were to be sold to a particular person. Mr. Gould doubts the correctness of this law.

1 Roll abr. 95.
Poph. 144.
2 Bul. 59
3 D^o 560.

4 T.R. 177
3 D^o 757
Stra. 653
2 Roll 5
Salk. 282.289.

When the servant contracts in the name of his master within the scope of a general authority, the servant is not bound. But if he bind himself by any observation he will be bound. But when he contracts in the name of his master, without having authority so to do, he is personally liable.

1 Roll 95
2 Roll Rep. 270

Pre. Ch. 128
2 Vern. 127

any

Master & Servant

Any person acting in behalf of another by authority given to him is in that affair a servant & binds the master — so of a wife. — 1 B. 430

2 Esp. Rep. 779.
3 B. & P. 247.
1 Esp. R. p. 270
Bar. Sel. Cas. 497.

It is not yet decided in England whether the master is liable for expenses incurred by the servant during sickness — most of the authorities go against it — This applies to all servants. —

Servants Liabilities

1 Bl. 431.
Skin. 228.
3 Bac. 562
Salk. 18
Cowp. 406.
Cro. Eliz. 175.

As to acts not done within the scope of an authority express or implied delegated by the master to the servant the servant only is bound, & this case embraces wilful torts.

Stra. 1089
Wils. 328.
Esp. Dig. 580-6.
6 T.R. 411. 125.

There are still other cases in which strangers injured by the servant may prosecute either servant or master. Such as if the servant negligently or carelessly injure another in performance of the master's business, if the transaction were not founded in contract between the master & stranger, either master or servant may be liable; as in the case of driving the carriage negligently & upsetting another. One example is sufficient. But on the other hand if the injurious transaction were a violation of a contract, the master is liable. There is a contract between a Blacksmith & a stranger,

1 Bl. 466.
Cowp. 406.
Salk. 603.

when the latter sends his horse to be shod; if the servant injures the horse, the master only is liable. —

There

Master & Servant

There is an exception to this rule which fortifies it. The master of a ship as well as the owners is liable to a freighter for any injury done to his goods, because, says the court, he acts not only as servant, but an officer. Mr Gould likes not the reason, but seeks it in general convenience. Salk. 440. Carth. 58. 1 Vent. 190. Sir T. Ray. 229.

6 T.R. 125

But if a servant commit a wilful tort, in all cases he is liable, Mr Gould thinks, to the party injured, for in the very act, he follows not his master's biddings, but stands in the light of a stranger.

If too much money be paid to a public officer by mistake &c. the government, not the officer, is liable; but if the officer extort money he is personally liable.

Cowp. 182

If an attorney know of the release of a cause of action & still may prosecute, because he is not bound by his judgment; if so he might be liable for any questionable case. If however he be guilty of fraud in any matters of practice, he is liable.

1 Roll 95
1 Mod 269
2 Bac. 595

Hutt. 125
Esp. Dig. 618

How far the servant is liable to his master. The general rule is, that he is liable to his master for all wilful wrongs, & for a neglect of duty by which the master is injured &c as if by the neglect of a servant cattle entrusted to him die. In a case where a servant landed the goods of a merchant

1 Woodeson 456

Jo. Ja. 264
Coma. 109

merchant before payment of duties,
which occasioned their forfeiture.
Master & Servant 4 He was holden liable to the master
on account of a breach of duty.
But an action will not lie for the
master for a mere breach of orders
by the servant, if no damage en-
1 Salk. 283 sue. The master's remedy in this
case lies in correction. The same
1. Lev. 188. remedy can only be applied for
1 Keble 88. Moore 248 the rudeness & insolence of servants.
1 Sid. 298 If however, the servant neglects a
lawful command of the master
by which the master sustains an in-
jury, the servant is liable to indem-
nify. The same rule holds where
the servant neglects any duty or
1 Wils. 325 implied command, where there
Esp. Dig. 617 was no express command. Thus
— if an attorney neglect the cause
of his client, he is liable on this ground.
The rule of law which prescribes the
duties of the servant determines
of course the implied under-
takings of the servant. But he
regularly undertakes only for
diligence & fidelity, not for strength
or skill; consequently these two
qualities alone render him lia-
10 Mod. 109. ble for all wrongs or injuries
3 Bac. 564 not wilful. This rule admits of
an exception where the servant
undertakes in his professional
capacities, since in this case
he undertakes for a skill & strength
as well as for the first two qualities;
as if

Master
Servant
11

as if one hire himself as a journeyman to a shoemaker. This class of cases forms the only exception to the general rule. In pursuance of these distinctions, the servant is not regularly liable for a loss of his master's goods by robbery, because fidelity & diligence could not prevent their loss. And generally, the servant is not liable for such accidents as cannot be prevented by ordinary diligence & fidelity, as (accidents) by lightning, tempests, robbery, public enemies, mobs &c. The servant is liable to the master, whenever the latter has been subjected to damages for the misconduct or neglect of the servant. As if a servant of A drive his master's carriage against B's by negligence & injure it, for which A pays damages; the servant must indemnify A. The latter rule, however, supposes A not to have been actually a party to the wrong committed by the servant; if he were, he could have no remedy against the servant. In such case, the master and servant are joint tort-feasors; and in all cases of joint wrongs, one has no remedy against the other for a contribution because he has paid the whole damages. Formerly

4 Co. 84.
3 Bac. 564.

10 Mod. 109
3 Bac. 564

2 Stra. 1083
10 Mod. 109.

8 T.R. 186.
Kirby 116.

Master & Servant

I formerly brought under this title the servants liabilities criminaliter for embezzling the master's goods, but I now refer the student to Larceny for a consideration of the subject.—

1 Sid. 175.
1 Bl. 428.
1 Hawk. P.C.
111, 130.
Hol. 179
Stra. 170.
2 Mod. 167.
8 Do. 120.

Master's authority over the servant.— The books generally say that the master has a right to chastise his servant for any breach or neglect of duty. This correction must be reasonable. What is reasonable is sometimes a question of law, but in general it is a mere matter of fact. The rule as above laid down in general terms, is not correct. Nothing is more clear than that all servants are not liable to correction — those of the fifth class are not included in it, as brokers, factors, attorneys, agents &c indeed, I think on principle, it can only extend to such as belong to the master's family & are subject to his personal control. It rests upon the same principle as the parent's authority to correct his child. It may be asked to what classes does the rule apply? It certainly extends to slaves, apprentices of any age, & menial servants who are minors, and I conclude to such servants in Pen. as are bound down to creditors by authority of law. But it would seem, it does not extend

1 B. C. 428.

to menial

Master & Servant

to menial servants of full age, & certainly not to day labourers. For this limitation of the general rule I find no authorities, but conceive it results from the nature of the case. If therefore the master beat any other servants than those above mentioned, it is a good cause of departure.

§ I observed just now that the question of reasonableness in chastisement is in most cases a question of fact, but one case the law has settled; the master can never justify the wounding or maiming of his servant, but where it is merely assault & battery the jury determine as to its reasonableness. If therefore the servant bring an action for assault battery & wounding, & the master justify generally, his plea will be bad for the whole. He may justify as to the battery, but must plead not guilty as to the wounding. The law does not designate what amounts to a wounding. I presume it is in all cases a laceration. The Stat. 4 Anne has varied a little this rule of the master's pleading. By the Stat. the master may plead double — not guilty as to the whole & justify as to the assault & battery. In Con. no such Stat. obtains. In pleading a justification as master, he must allege the retainer, the place where, & the business in which the servant was retained & employed. The retainer & employment are traversable, & to all traversable facts a venue must be laid. The personal authority of the master over the servant is founded on a contract strictly fiduciary & it consequently follows that he cannot delegate

2 Mod. 167
8 T.R. 120. 218. 330.
3 Bac. 557.
1 Sid. 177
3 Bac. 566.
9 Co. 76. a
2 Ins. 167.
L^d R. 62. 310.
Cro. Jac. 360
Sha. 953

Master & Servant

delegate to another his right of correction. It is sometimes asked, if this be law, how can the master of a minor servant authorize a school-master to correct him? There is, says Mr. Gould, no inconsistency in this. The schoolmaster does not correct him as a servant, but by virtue of his authority as schoolmaster, & the master is authorized to put his minor servant to school. So from him is derived the schoolmaster's authority, but he exercises it as schoolmaster & not as agent of the master. In the exercise of this authority if the master occasion the death of the servant, he is liable for justifiable homicide, manslaughter or murder, as the circumstances of the case will warrant. —

1 Hale P.C. 454
473-4
1 Haw. P.C. 111.
Kelyng 65.
Foster C.L. 262.

A servant cannot avoid a deed obtained by the duress of the master executed by the servant himself. He is not bound by his duty to give a deed to relieve the master from the duress; therefore, in this case he acts as a mere stranger, consequently neither he, nor any other can take advantage of duress to another to avoid his own deeds.

1 Roll. 624.
3 Bac. 568.

The master's remedy against third persons for injuries done to him in the relation of master. — An action will lie for him against any one who entices away his servant by a per quod servitium amisit. If the servant be taken by force, the proper action is trespass vi et armis laid with a per quod servitium amisit. If without force case with a per quod lies for a man enticing away. And if a servant without

Cowp. — 56
1 [illegible] 469
Salk. 380
Ld. R. 1116
6 Mod. 182

2 Ld. R. 1632
1117
2 T.R. — 166.
Cowp. — 56.
3 Salk. 191
2 East. 8. 13.

Master
Servant
II

without enticement leave his master's service without cause; a retainer by another master knowing of the former retainer gives a right of action against him by the first master. The gravamen is a knowledge of the former retainer.

Noy 10. 106
2 Lev. 63

It was formerly a question whether any enticing away was an indictable offence. It is settled that it is not. If a servant be beaten by a stranger, the servant may have an action of trespass for the battery; if a loss of service ensues, the master also may have his remedy. Each can maintain his action for the injuries are distinct & hence the actions are for different causes. The master in this case must declare with a per quod servitium amisit. A minor child is a servant within these rules, & an adult may be, tho' he is not so prima facie. He is so when actually a servant to his father. It is on this ground that a parent can recover for debauching his daughter — it is as master, not as parent that he recovers. Vide Parent & Child. — If one beat the servant of another so that he dies, the master, on principles of the common law has no remedy — the private injury is merged in the crime. It has been determined that if a surgeon intentionally injure a servant's wound, an action will lie for the master. Mr. Gould sees no reason why it should not if occasioned by neglect or want of skill. In the case of a servant enticed away, or leaving &c, a recovery had by the master against the servant & full

Salk. 380
3 Ld. R. 1116.

Yelv. 89. 90
2 Roll. 568
1 Ld. Ray. 339.

1 Roll 98.
2 Bulst. 332
1 Roll. Rep. 124
Esp. Dig. 601

3 Burr. 1345.
1 H. Rep. 35

satisfaction, is a bar to an action against the stranger who enticed or retained him.

Master Servant

What acts master & servant may justify in each other's defence.

The master may justify assisting a servant in a suit without its amounting
1 B. C. 429 to maintenance, which it would be in a
2 Roll 115-6 stranger. This is on the ground of a duty of protection in the master. The servant may clearly justify an assault in defence of his master, because this is a part
Salk. 407. of his duty. He may justify in defence of
2 Roll. 546. his master as much as his master may
1 Bl. 429. justify in defence of himself. But a servant cannot justify an assault in defence of his master's son, any farther than he could in defence of a stranger. The right of defence in the servant
3 Bac 568 is strictly personal to the master. Neither can a servant justify an assault in defence of his master's goods.

Whether on the other hand a master may justify an assault in defence of his servant, is still a question. I think that he may. The opposing reason is,
4 Co. R. 62. he may have an action for injuries
Salk. 407. done to his servant. So he has when one
1 Bl. 429. is done to his goods & yet he may jus-
2 Roll 546 tify a battery in defence of them.
Lawson Pl. 124.

Litchfield, Connecticut.

Parent and Child,

including

Guardian and Ward.

By

James Gould Esq.

June 22. 1812
Lecture 1.
Gould J.

Parent & Child including Guardian and Ward

2. Bac 118
Ld. Ray. 1011. 259
1. B. C. 443

An infant or a minor by the Common Law of England is any one male or female who is under the age of twenty one years. In common parlance by an infant is meant any one of very tender age, but in the Common Law of England the term embraces all under the age of twenty one years. The period of full age is not the same in all countries. By the present code of the French Empire twenty five years is the period of full age in most cases, tho' in some respects of full age at twenty one years. It was thus in the Civil Law of Rome, prevalent in this respect among others in many countries in Europe. Privileges & Disabilities of Infants. On this subject it is proper to take a view 1 of Crimes 2 Torts. 3 Contracts. By the Common Law of England alone no person can be punished under the age of seven years. Because under that age he is considered as destitute of capacity & understanding to enable him to choose or make a distinction between what is morally right & what is morally wrong. There is a difference between ~~the~~ act prohibited & the quality of that act. An infant under seven years may commit a forbidden act, but cannot commit an offence. At the Common Law of England, a person is liable to punishment for forbidden acts at the age of fourteen years. Between the ages of seven & fourteen years, the infant is pun-

4. Blks. 20-23
1. L. 464.
1. Hawk. P.C. 1
1 Inst. 247

punishable if he is proved to be doli capax. It is said in some of the books, however, that between the age of seven years and ten & a half the presumption is that he is not doli capax. & that the burden of proof falls upon the prosecutor. And that between the age of 10½ & 14 the presumption is that the infant is doli capax & the burden of proof falls on him. This rule however is not supported. Mr Gould takes it to be clear that the presumption is in all cases that he is not doli capax, between the age of seven & fourteen years.

Foster C.L. 71. 72
1. Hale P.C. 24. 25-6-7.
4.34. Blk. 404 L
4 Blk. 22. 23 ——

It is said in some of our books on Crim. Law, that infants in some cases above the age of fourteen years are privileged in misdemeanors. The books do not mention what these cases are but Mr Gould thinks them to be confined to offences of mere omission. Because in no other cases has he found instances in the books. In capital cases they are never privileged. The reason why the cases are confined to omission, with regard to an infant over the age of fourteen is because he is not considered as having the control of his own means. They are in fact in the hands of his guardian, whose duty it is to act for the infant —

2. Hac. 130 —
1 Hale 20. 22 —
4 Blkst. 22 —

With regard to infants under seven years of age the presumption is that they are not doli capax. This presumption can never be permitted to be rebutted. This is called presumptio juris de jure, being an inflexible rule of law. The rule is now settled beyond all controversy that an infant under

Plow. 19. Foster 72
439. Cr. L. 22 & 23

the age of seven years can in no case whatever be convicted. And here I would remark, that in consequence of the incapacity under which the Law supposes infants to labour, an infant is never to be convicted on his own confession without great caution. In a case before Justice Foster an infant pleaded guilty, & insisted on the plea. The Judge, however, directed the plea of not guilty to be entered instead thereof, & he was regularly tried tho' found guilty. And this is now the rule of law in England. In cases of felony, the infant's confession will not be admitted — in misdemeanors with great caution. This is Common Law. General statutes inflicting corporal punishment sometimes extend to infants though not named; & in other cases do not extend to them unless named. I speak of penal statutes inflicting corporal punishment. If the offence created by statute is such as is corporally punished at Common Law, infants are liable though not named. E. G. If a statute should provide that whoever should obstruct the Highway, or create any nuisance, should be guilty of felony & punishable with death; infants would be within it, because the offence is corporally punishable at Common Law. But if a statute inflicting corporal punishment prohibits an act, but does not constitute it such an offence as is corporally punished at Common Law; infants are not punishable under it unless named. This

Parent & Child.
4 B. 337.
1 B. C. 464.
1 H. P. C. 20 & 23.

Cro. Jac. 466
Fost. C. L. 70.

With regard to punishments collateral to the offence.
1 Hale P. C. 21, 22.
3 Bac. 131.
1st Inst. 247. 357.
1 Dow. 331.
Cro. Jac. [illegible]

This distinction is founded on the benignity with which the Judges of England have construed statutes in favour of infants.

2. Torts. It has been generally entertained by lawyers that infants were not liable for torts until the age of fourteen years. It is however incorrect. An infant is liable civiliter for torts committed by him at any age. Torts, as used here is confined to wrongs committed by force. Torts, as the word is generally used at present, includes all wrongs. But it was originally of less extensive signification. "Why, it may be asked, is an infant liable for torts, when he would not be for criminal actions?" Because the offence does not regard the will or disposition with which it was committed. An action of battery was maintained against an infant of the age of four years for scratching out a man's eye. When a civil wrong is committed, it is not by way of punishment, retribution &c that the party is bound to make satisfaction, as that is the part of the Criminal Law. But the party committing the act, shall rather make compensation, than the party suffering bear it.

1 [illegible] 1.
9 Vin. 395.
1 Hawk. 3.
2 Rolls Abr. 547.

It is laid down in some of our books that an infant is not liable in the action of slander, until the age of seventeen years. But there is no authority to support this. The action of slander is founded upon malice. Therefore an infant cannot be liable in an action of slander until he is proved to be doli capax. At the age

age of fourteen years, therefore, Mr Gould considers an infant liable civilly in slander, as criminally for crimes. Noy. 139 3. Bac. 132 It is laid down in the books gen, that infants are liable as common cheats to be punished; tho' it is said, tho' it is said they are not liable for fraud or cheat civiliter. Sid. 129. 528. 1 Lev. 169 1 Keble 778. 905 — 913. 914. 1 Fonbl. 71 It cannot be meant at the age of six months or six years. But is meant probably, when doli capax. An infant, Mr G. would think, will be liable for a cheat civiliter or a fraud when doli capax, and does not consider it to be law that an infant is not liable as a cheat at the age of fourteen. 2 Brow. 181 Peake's Rep. 223

But tho' an infant at any age is liable for torts committed by force, an action sounding in tort, cannot be supported when the cause arise ex contractu. Thus when A let a horse to an infant to ride, & infant abused him, A brot an action for fraud in the infant in the abuse. Though the declaration stated a fraudulent intent, yet the real cause of the action was in the bailment, & altering the form of action could not avail. 8 T.R. 335 In some cases, however, Chancery will decree even a contract against an infant to be good, on account of fraud, i.e. to prevent fraud. But this cannot be done in a Court of Law as it would be destroying every barrier formed for the protection of infants. The Court of Equity interposes by reason that the Chancellor is considered Guardian Paramount of all the infants in the Kingdom. The relief, however, is so moulded as

to

Parent & Child.

3 Bac. 140
1 Fonbl. 70-71
9 Mod. 38
2 Eq. Cas. Abr. 489
Contra 1 Root —
179. 272.

as to do perfect justice between the parties. The cases cannot be distinguished with certainty on account of the discretion of the Chancellor. A Court of Equity cannot interpose when the contract is absolutely void, but when it is voidable. When it is voidable, it is binding until it is disaffirmed, or annulled. But when the contract is absolutely void, it is considered as perfect non-entity & forms no grounds for an affirmation. And it is also said in this case that no consideration moves to the adult.

1. Fonbl. 49.
1. H. Blks. 75

Lecture 2.
Gould.

With regard to those privileges and disabilities of infants which are of a miscellaneous nature & do not properly come under any particular class. — In England the age for choosing guardians is fourteen years both with males and females — By the statute of Con. the age is 14 for males and 12 for females.

1. Bl. C. 463 —
Stat. Con. 27
old ed.

An infant may be an Executor at any age, i.e. he may be invested with the character and enjoy the rights of an executor, but cannot act as such until the age of seventeen years. And if an infant is appointed under the age of seventeen years, an administrator durante minoritate must be appointed to act for him, i.e. till he attain the age of seventeen years. The administrator acts by virtue of the trust arising from the will, & is called, Admr. durante minoritate cum testamento annexo. But no one can be an administrator till he arrives at the age of twenty one years

Wentw. 304
5 Co. 29. Hob. 250
Carth. 466 & 7
Salk 39
Ld Ray. 338

Parent & Child

years. Because he is bound to give a bond & such is our own law. But an Executor in England is not required to give a bond, on account of the confidence reposed in him by the testator.

5. Co. 29.
Comb. 475.
5 Mod. 395.
Carthew 446 & 7 -

In Con. Mr. Gould thinks an executor cannot act at the age of seventeen years because by our law he is required to give bonds. Therefore the same reason excludes a minor executor from acting here as prohibits the appointment of an administrator under twenty one, in England. Either he cannot act until twenty one, or a bond given at seventeen years of age will bind him. But the privileges of infants cannot thus be taken away. He may be an executor but cannot with us exercise the functions till the age of twenty one years. —

Here as in England the age of consent to marriage is fourteen in males and twelve in females. But if one of the parties is of the age of consent & the other not, the former as well as the latter may dissent.

1 Bl. 436
1 Inst. 79
1 Bl. 463

But it is a rule of English law that a female may be betrothed at the age of seven years, & if after she has attained the age of nine, her husband die, she is entitled to Dower. If the wife attains the age of nine years & neither party dissents, she is entitled to all the privileges of a wife on the death of her husband.

Ld. H. Tit. 1, sec 36
1 Bl. 463.
2 Do. 131

The better opinion is that in England a

Parent & Childs
1 Inst. 89
2 Vernon 104
4 09 - 2 Mod. 318
Prec. Chanc. 316
1 B. C. 463. —
2 D. 497 —

a male at the age of fourteen years or female at the age of twelve years may dispose of property by will. —

By Con. Statute the age for disposing of personal property by will is seventeen years in both sexes. — The full age is completed the day preceding the twenty first anniversary of his birth. The Law regards no fraction of a day. —

Salk 44. 625
1 B. C. 463.
L. R. 480. 1096 —

Privileges & Disabilities of Infants in relation to Contracts.

It is a general rule that no person under the age of twenty one years can bind himself by contract — Contracts made under that age are generally void or voidable —

1 B. C. 465 —)

If an infant & an adult binds themselves in a joint contract, the latter is bound tho' the former is not. — Thus if A an adult, & B. an infant join in a bond, (a bond which would not bind the infant, alone) it is the sole bond of the adult. On the other hand, if an adult contracts with an infant, the former is bound tho' the latter is not. — And this rule holds as to contracts of marriage between an adult & a minor. The infant, tho' of the age of consent, is not bound — yet the adult is. — The contract in this case, & when mentioned before in this Lecture is understood to be executory — If actually married in the latter case, they are bound — The same rule holds in Equity — They will do, however, perfect justice between the parties, never allowing the infant to suffer. —

2 Ley 500 —
8 Mod 191 —
1 Root 58.
1 Pow. Con. 38.
1 Mod. 25. —
1 Sid. 41. 446.
1 Ventris 5
2 Stra. 937 —

Stra. 937 —
1 Pow. Con. 38. 40
9 Viner Abr. 39

It is a general rule of law that if one party to a contract is not bound neither is bound. And what has been previously laid down does not contradict this rule. For this rule has reference to those cases when by the *terms* of the contract both are not bound. In contract between A an adult & B a minor, the contract stipulates for both, A is bound & B is not. But when the contract as to the infant is strictly void, the adult cannot be bound. It is considered, as has been before observed a non-entity in law and forms no consideration. But when the contract on the part of the infant is merely voidable, of this the adult party cannot avail himself as defence. And it is a rule of Common Law that if an infant has received any consideration from an adult in performance of a contract between them, and the infant afterwards avoids the contract, he is not bound to refund what he has so received. The fraud consists only in the breach of contract, & for this infant can by no means be liable. The law supposes the infant incapable both of making a contract, & of making use of the consideration.

Prun & Chit. 12

2 Stra. 938.
1 Powell Con. 39.

1 Sid. 129.
1 Levinz 169
1 Keble 905-13

Tho' it is a general rule that the infant cannot bind himself in contract, yet he may bind himself for necessaries. The law has determined what shall be considered as

Parent & Child

1 B. 466
Cro. Jac. 494
1 Sid 112
8 T. R. 578
1 P. Com. 3485

Cro. Eliz 583
Cro. Jac. 560
Peh 151

as such: viz. food – apparel, lodging medicine, instruction. This exception is made for the advantage of infants. They are made able to pledge their credit for necessaries that they may not suffer for the want of them. The articles contracted for, however, must be necessary for the infant at the time of contracting. The question whether the article purchased was necessary at the time to the infant is a question to be left to a jury. And as the jury are to determine this fact, to the plea of infancy the pltff may reply necessaries generally.

Carth 111
4 Bac. 17

The necessaries must have been particularly set forth, were it a question of law.

Str. 168
Esp. Dig. 161
3 Bac. 133 & 4.

And as an infant may bind himself, on his own account so also on account of his wife & children – The infant is bound for *all* the contracts for which his wife was bound before marriage, as he takes a wife *cum onere*.

Barns notes 95.

But the rule that an infant may bind himself for necessaries must be taken with qualification. He cannot bind himself for necessaries if under the care of a parent, guardian or master & were supplied with necessaries. The case must be clear that he is not duly provided for or he cannot be bound.

2 Blks. Rep. 1225.
P. Rep. 229
2 Lt. Raym. 35.

An infant then can bind himself for necessaries in three cases only viz

1. Having no parent who is bound to furnish him with necessaries –
2. Being out of the reach of master parent or guardian –
3.

3. Having parent, guardian or master, is still not duly provided for. Parent & Child.

In both the latter cases, the parent &c is bound as well as the infant by the latter's contract. For the object is not to exonerate the parent from his duty. He or the infant may therefore be resorted to at the election of the party. — B 446

Lecture 3— Gould—

According to statute of Con. if a parent permits the infant to make a contract binding himself (infant) the parent shall himself be bound.— Stat. Con. Title Master & Serv.— Kirby 287—

An infant is not bound on the expreſs contract even for neceſsaries, because he is not obliged to pay of course what he therein stipulates; but only the true value of the neceſsaries. The obligation that he will pay such true value arises from the implied contract. For as he cannot be bound by the terms of the expreſs contract, the obligation cannot arise thereon.— Cro. Eliz. 582. Latch 169.— Cro. Jac. 560.— Popham 151.

The mode in which an infant may bind himself for neceſsaries.

1. An infant cannot bind himself by a penal bond even for neceſsaries.— Cro. Eliz. 920.— 1 Roll. 729— 1 Pow. Con. 54 Esp. Dig 161—

2. But by a single bill, i.e. an obligation by deed containing no penalty, he may bind himself for neceſsaries. Cro. Eliz. 920 Pow. Con. 35 1 Lev. 86— 2 Str. 939 Chit. on Bills 20

3. By a negotiable note, when actually negotiated an infant is not bound, tho' it were given for neceſsaries. 1 T. R. 41— 1 Fonbl. 73

4. By a note not negotiable, or a negotiable note not negotiated the infant

Parent & Child 113
1. Woodes. 483 note
Carthew 160
1 Fonbl. 73
1 Pow. Con. 345.

an infant is bound. With regard to the note not negotiable there can be no question, as the rule is settled, & as the same reason obtains in the latter case, Mr. Gould, hesitates not to say it will come within the same rule.

Carth 160
1 Fonbl. 73
Chitty on Bill's 8 & 20

5. By a bill of exchange not negotiated the infant is bound for necessaries, but by a bill of exchange negotiated he is not bound.

3. Bac. 134.
Catch. 160
~~Nov. Th.~~
1 T. Rep. 40.

Lastly. An infant is not bound by an account stated, though the items of the account may be for necessaries.

These constitute all the distinctions with regard to the mode in which an infant may bind himself in contracts for necessaries. We proceed now to the reasons upon which these rules are founded.

3. Bac. 134
Co. Litt. 172. a
Cro. Eliz. 920
1 Fonbl. 73

1. An infant cannot bind himself in a penal bond, because the penalty is presumed to be to his disadvantage. Mr. Gould considers the true reason to be because the consideration cannot be examined. (which reason extends to the rule with regard to negotiable notes negotiated. Bills of exchange negotiated &c. in which cases if they were permitted to bind, when the consideration is not examinable, the infant would be bound whether the contract were made for necessaries or not.)

If the form of the contract is such that inquiry may be made into the consideration, the infant is bound, provided it be for necessaries.

2. With regard to Single Bill, the

consideration was anciently examinable & therefore foundation for the rule that an infant is bound by a Single Bill, if for necessaries, as the rule is ancient. When an infant executes a Single Bill, Mr. G. thinks the consideration may be examined, to preserve the rule & the reason of it, tho' it forms an exception to the general rule that the consideration of a single Bill cannot be examined.

Parent & Child
1 Keble 382
416—423
1 Lev. 86—
Chitty on Bills
20—

1 Vt. Rep. 41—

344. By a negotiable note actually negotiated the infant is not bound tho' for necessaries. The reason is because the actual consideration is not examinable. But if the note is not negotiable he is bound, as the legal title cannot be conveyed away & the consideration can be gone into between the maker & payee. So also the note being negotiable, is not negotiated.

Kyd on Bills 155.
1 Strange, 173
1. Pow. Con. 345
341.— 1 Woodes.
403. 1 Blks. Rep.
445. Chitty on Bills
9. 20. 21. 51. 82.
87. Peake's Cas.
61. 216—
Doug. 614—

5. A Bill of Exchange is on the same footing with a negotiable note.—

Lastly The rule is that an infant cannot be bound by an account stated, tho' for necessaries.— The true reason of this rule no longer exists, tho' the rule still obtains.— The items of an account stated were not anciently examinable i.e. the consideration was not anciently examinable. At present items of accounts stated are examinable, yet the rule is still preserved in modern decisions.

Latch 169
3. Bac. 126 note
1834. Am. Ed.
Cro. Jac. 622.
1 Vent. 73
1 T. R. 40. 42
1. Pow. Con. 35.

An infant purchases necessaries

and

Parent & Child

and executes a penal bond, he is not liable on the bond. — The question is then whether he is bound by the contract. This depends upon the question whether the bond is void or merely voidable. If the bond is void, the contract is binding. But if only voidable he would not be liable on the simple contract. Because a voidable specialty will merge a simple contract, but if void, being in itself a legal non-entity, nothing can be merged therein. The question whether a penal bond is void or voidable will be taken notice of hereafter. Mr. G. merely suggests at present that the proposition that it is void, is not well supported.

3 Burr. 1078 –
Esp. Dig. 90 –
1 H. Blks. 462
Stra. 247 –
Bull. N.P. 182
Esp. Dig. 175·6

A single Bill does merge the simple contract. But the rule of damages is not the same in the case of an infant as in that of an adult — being governed by the real value of the necessaries for which it is given.

Esp. Dig. 151
Bul. N.P. 115 –
Pow. Con. 218

A promissory note in Con. is considered as specialty, as being of as great solemnity.

For money lent, an infant is never bound unless it is actually laid out in the purchase of necessaries. The Common Law is that an infant is not liable unless the person lending himself lays out the money for necessaries. The reason is because the contract must be made good & valid at the time & not by any thing ex post facto. But even in this case the party lending does not recover as for money lent, but for the value of the necessaries, standing the place of the seller of the necessaries. In the character of a lender he cannot recover, money lent not coming under the class of necessaries fixed by law. In Equity an infant is bound for money lent provided he himself lays it out in the purchase of necessaries. He is not bound, however, to repay the money lent as matter of course, but the value of the necessaries so purchased by him the infant. Provided, however, the value do not exceed in any case the amount of money so lent.

Salk. 279.
386 - 10 Mod. 67
5 Mod. 368

1 P. Wms 558. 583
1 Pow. Con. 37
2 Eq. Cas. abr. 516

An infant is not bound on contract for articles to maintain his trade as they do not come within the class of necessary established by law.

Cro. Jac. 494
1 Pow. on Con. 36
1 Salk. 279
1 Roll 729
Stra. 1083

Lecture 4 Gould

An (inf)ant is not bound by a contract to pay for repairing his buildings not coming within the legal description of necessaries. The guardian should in these cases provide for him. But it has been holden that if an infant takes a lease of a house & resides in it till rent day and the rent is not above the value, he is liable. The reason of this Mr. G. cannot perceive. It cannot be upon the principle of lodging, because the case is the same in a lease of land. This latter rule with regard to the lease of house and land to infants appears to be

1. Pow. Con. 36
3. Salk. 196

Cro. Ja. 320
2 Bulstr. 69
1 Pow. Con. 35

Parent & Child

to be so directly opposed to the ordinary rule & principles, that I think it questionable. It has been holden that an infant is not liable for instruction in singing and dancing.

1 Sid 446.
1 Fonbon 36.

These branches having become more attended to at present than formerly I think it quite doubtful whether an can in no situation whatever bind himself for instruction in these branches.

If an infant does voluntarily what he is compellable to do at Law or in Equity, he is bound by the act. Thus if an infant is joint tenant or tenant in Common & makes equal partition he is bound by it, i.e. if it is just and not injurious in the least to the infant. Suppose an infant mortgagee, on debts being paid, reconveys the land to the mortgagor, the reconveyance binds him at law, because he might have been compelled to reconvey in Equity.

3 Burr. 1794
1801. 2 Bac. 684
1 Inst 72. a
135 a. 1 Fonbl.
77. 1 P. Rep. 575
Comm: Dig. 15.

This latter seems to be the only class of cases in which an infant is bound at Law except for necessaries.

2 Vernon 342.
120. 2 Vernon's
351. 1 Vern. 205
1 P. Wms 504
2 Do 401
3 Do 352
2 Atkyns 352
626.

An infant Deft. is bound by a decree in Chancery, except that he is allowed six months after he attains full age to impeach the decree for fraud or error. Until six months after he arrives at the age of twenty one years, he shall not be barred shewing matter of fraud or error for its reversal, but his infancy at the time of the

3 Atk. 626
1 Sirnol. 75

of the decree is no cause for such reversal. Rung 7 Chia 173

But an infant plf. is as much bound by a Decree in Chancery as an adult, unless he can shew fraud or neglect in his *prochein ami*, or person who prosecutes for him. Fraud &c. in the opposite party being nothing of which he can take any advantage by way of reversal.

Such acts of an infant as do not affect his own interest, but take effect from authority in him vested, are binding. If an infant, having recd. payment of a debt as executor, gives a discharge such discharge is binding. All lawful acts which an infant does in the execution of an office which the law allows him to hold, are valid. 3 Burr. 1802.

Tho' an infant is not regularly bound by his contracts, yet if after coming of full age he promises to perform a contract made during his infancy, such promise will bind him, even tho' the original contract was not for necessaries. The original contract must not, however, have been void, if so there would be no consideration for the subsequent promise, but if only voidable it would have been ratified by the subsequent promise. And if the original contract made during infancy was not void, tho' a written security was afterwards given which was

1 Str. 690
2 T.R. 766
2 Vent. 203
1 Hombl. 131
and 2 —
1 T.R. 648
Chitty on Bills 21

Parent & Child

was afterwards given which was void, yet the subsequent promise after attaining full age will bind them notwithstanding the written

Bul. N.P. 155.
Esp. Dig 164

security — The void security being a mere non-entity, has in this case no interposing effect. But on the other hand when the security so given only voidable, the parol contract would not form a consideration for the subsequent promise because it would be merged in the voidable security. Therefore when the security given subsequent to the contract, both during infancy is void, the subsequent promise made after coming of age attaches to the original contract, upon which the action must be brought. But where such security so given is only voidable, the previous contract being merged therein, the subse-

Esp. Dig 164
Bul. N.P. 165.
1 Root 58—

quent promise ratifies such security, upon which security the action must be brought. The distinction between these cases relates then to the form of remedy — But when a person makes a new promise at full age for a contract made during infancy, he is bound only to the extent of that promise. Thus if the original contract was to pay $100 & after full age, he promises to pay fifty dollars he can be bound for no more than fifty —

When the deft. pleads infancy & the plf. replies promise after full age, all the plf. has to do is to prove the subsequent promise, and it rests upon the deft. to prove he was not of full age at the time of making such promise.

1. T. Rep. 648
Esp. Dig. 164
3 Bac. 132
note —

It has been decided in Con. that the note of the infant is void, and that a subsequent promise at full age attaches to the original parol contract.

If an infant is arrested &c –

1 B. & P. 480

What Contracts made by Infants are void & what voidable? And here I would premise that any contract by which an infant is not bound, is either void or voidable. Courts of Justice of late have rather been inclined to construe the invalid contracts of infants as voidable, and this is generally in favour of the infant as he can have his election when he comes of full age, either to perform or abandon the contract.

Stra. 938
1 Burr. 566 –
3. D° 1805

It is laid down as a general rule first that those contracts in which there is any apparent benefit or semblance of benefit to the infant are only voidable, but that those in which there is no apparent benefit or semblance of benefit accruing to the infant are void –

1 H. B. 511 –
Cr. Chs. 502
Moore 105
1 Roll 730
3 Mod 310
1 Pow. Con. 133
38. 54 —

I have no doubt the former part of the rule is correct, but the latter part, is I think

Paunz & Childs
1 Inst. R. 3. 8
1 Roll 730 —
2 Vent. 203

I think questionable, as to the first part of the rule — The purchase of an infant is only voidable as coming under it.

1 Roll 730
1 Burr. 1888 -

Upon this principle the power of attorney given by an infant to accept livery of seisin is voidable.

Moore 105
2 Leonard 216
Dyer 337 a
Noy - 130.
Hutton 102
10 Mod. 421
424. 436
533. 12 Mod 162

On the other hand, in the latter branch of the distinction, it is said a lease by an infant not reserving rent, or if a trifle only is reserved i.e. a small amount compared to the real value, it is void.

2 Burr 1806

Opinions however are contradictory upon this case,

Litt. sec. 547 -
1 Inst - 45. 308. a
1 Lev. 6. Moore 78
5 Bac. 531 -

And in the next place there are weighty opinions against the rule.

Lord Mansfield denied this rule to be law in the case of Zouch v. Parsons — And it is well settled, that an infant may make a lease without rent to maintain an ejectment to try his title — And what is instar omnium upon this subject, the infant's lessee can in no case avoid the lease on account of the lessor's infancy, whereas if such lease were void it could bind neither party.

3. Burr. 1806 —
3 Bac. 137
1. Pow. Con. 38
1 Fonbl. 79.
1 Bl. Est. Rep. 548
3 T. R. 161 —

Lecture 5
Gould

The case of a penal bond executed by an infant has given rise to diversity of opinion as to the question whether it is void or voidable.

1 Roll 720 —
Moore 679
Co. Litt. 920
Hutton 116
1 Bur. [illegible] 54
Esp. Dig 164

In our books it is generally said that a penal bond is generally void, when executed by an infant, because the penalty can be of no advantage to the infant. The authorities contra Litt. Sect. sec 259. Co. Litt 172. Perkins sec 12. & 154. 1 Woodeson 403. 3 Burr. 1804-5.

It then remains a question whether a penal bond executed by an infant is void or only voidable. I cannot discover what protection it should be to the infant that it should be void. The penalty cannot be taken against his will provided it should be only voidable & it certainly is advantageous to the infant that he should have his election on coming of full age either to avoid the bond or ratify it. And this I think to be an answer to the argument ab inconvenienti in favor of the bond's being void.

In the first place it is a settled rule that the infant cannot plead non est factum to his penal bond. Tho' this may have some weight yet I do not think it conclusive in favour of the bond's being voidable, because the same cannot be pleaded to a power of attorney executed by an infant, which is without doubt absolutely void. But it is a general rule of pleading, that when an instrument is merely voidable it must be avoided by a special plea, but when it is strictly void, non est factum may be pleaded.

Salk. 279
5 Co. 119
Ld R. 315
5 Bac 337
3 Burr. 1804
1805

In the second place, we have the authority of the Court of Equity that a penal bond executed by an infant is not void, but only voidable. This Court can never interpose only when

1 Pow. on Con 35.
1 Eq. Ca. abr. 282
1 Wood. 403
1 Fonb. 71

Parent & Child

in cases of infants, their contracts are void ab init.

I would again observe that the latter branch of the rule laid down yesterday viz. that those contracts in which there is no apparent benefit nor semblance of benefit, are void, is very questionable, and does not in fact appear to be law, but is incorrect. Because there there is something in it so very vague & indefinite & seems to leave a great deal to the discretion of the judge; and there seems to be no reason nor rational principle on which the rule should be founded.

The first branch of the rule viz. that those contracts made by infants, in which there is any apparent benefit or semblance of benefit to the infant are only voidable, appears not to militate against any rule of law, & regards principally & almost solely purchases made by infants.

The last branch of the rule relates to sales, leases, conveyances made by infants.

Perk. sec. 12 & 19
3 Burr. 1804 & 5
Litt. sec. 259
1 Roll. 730
Latch. 10
5 Bac. 535.

I take the correct rule to be that all sales leases conveyances, gifts, grants deeds, or obligations made by infants which do not take effect by manual delivery are void, but, that those which do take effect by manual delivery are only voidable.

This is substituted instead of the last branch of the first general rule. With the first branch I have no controversy. I come to particular examples, the

pertinent,

The feoffment of an infant, it is well settled, is only voidable. It is voidable because it takes effect from manual delivery.

1 Pow. Con 3283
3 Burr. 1804 13
Perk. sec 259
4 Co. 125 a
8 D. 42

Again — If an infant contracts to sell a horse & actually delivers him, the contract is voidable. But if the contract is executory & he does not deliver the horse, the contract is void, and if taken away by the other contracting party without such delivery, he is liable immediately in trespass, as the contract does not pass the property — There has been no good reason given for making this distinction. When the contract does not take effect by delivery manual, the other party relies barely upon the word & contract of the infant, upon which he can place no dependance — by which the infant comes under no legal obligation. But he cannot be allowed to regard his own act as a nullity. This seems to be the only reason, tho' rather technical & not fully satisfactory.

Perk. sec. 12
19. H. 6. 77
Latch 161
3 Bur 139

The words of the rule "which take effect by delivery" are very emphatical. They make a difference between the deeds of an infant which convey an interest and those which delegate a power. The former are voidable, but the latter void.

3 Burr 1804
Perk. sec 12
Litt. sec. 259
8 Co. 42 b
5 Co. 119
Shep. Touchst. 60.

But on the other hand a power of attorney made by an infant is void,

[illegible]

Parent & Child because it does not convey an in-
3 Burr. 1804 terest, but merely delegates an au-
1808 thority. (Power of attorney does not
Nov. 13 take effect by manual delivery, i.e.
1 B. R. 577. 98. it does not convey an interest)
1 A. B. 475
2 Rolle 2.

There is an exception to this latter case.
1 Rol. 130 "When a power of attorney is given by
3 Burr. 1808 an infant to accept livery of seisin
in his behalf, it is only voidable,
and is founded upon the first branch
1 Sau. 32-3 of the rule yesterday laid down.

Upon the whole, then, the law under
this head appears to be contained
in the first branch of the first
general rule (mentioned in last lect.)
and the second general rule, with
regard to the distinction between
contracts taking effect by delivery
& those otherwise, which I have
substituted for the last branch of
the first general rule —

The consequence of all these dis-
tinctions is that the purchases of
infants are only voidable. And
3 Burr. 1795 Lord Mansfield in laying down
1 B. Rep. 579. the rule with regard to contracts
3 Bac. 139. of infants taking effect by deliv-
ery &c said such rule should be
modified in an extreme case.
— that if it would be, more ben-
eficial for the infant, the con-
tract should be adjudged ac-
tually void — this he says should
form an exception to the general
rule.

I have met with one reported case of this kind in which the contract was adjudged actually void. Report in Keble 369—

In these cases of which I have treated, except that of a penal bond, the contracts are executed, i.e. pass the specific interest *in presenti*.

With regard to the executory contracts of infants, they are generally void. Of this there is no doubt at Common Law—

A Promissory note, a Bill of Exchange, a Single Bill executed by an infant, are voidable, being on such ground most advantageous to the infant. Upon the same principle a contract by an infant to submit to an arbitrament, is merely voidable.

1 Sid 41.
1 Pow. Con 38—
1 Ventris 57—
1 Keble 1—
Stra. 85. 937—
5 Bac. 330—
Noy 93—
1 Roll 730
1 Lev. 17—

If a contract is strictly void, both parties may take advantage of its invalidity, & so many any third person whose interest is involved therein. But if a contract is only voidable, no advantage may be taken of it, except by that party and his representatives, from whose privilege the invalidity arises. In all cases where a contract is voidable, the other party (from whose privilege the invalidity does not arise) is bound by it—

1 H.B. 571—
2 T.R. 603
4 Co. 124
Carth. 436
Stra. 937
3 Burr. 1806

If an infant makes a voidable conveyance of a real estate, the infant and his privy in blood can take advantage

8 Co. 42 & 3
1 Inst. 337.
1 Roll 755)

7 Parent & Child

a advantage of its invalidity

2 Kilstrom 69
5 Bac 534
1 Fonbl. 131-132
1 Inst 3 a
2 Ventris 203
Cro Jas. 320

Another characteristic distinction between a void and a voidable act is, that a voidable act made during infancy may be ratified after the infant comes of age; and this confirmation may be either express or implied: It is ratified by implication if he acts upon the contract after attaining full age.

3 Co. 65.
Bra. 890
Co Litt 295 b

And here it may be observed that any act done by the infant after attaining full age evincing a disposition to waive the privilege of infancy, confirms a voidable contract made during infancy –

2 T.R. 766
3 Co 64 b
1 H.B. 75
Coop. 261.482
7 T.R. 83 –
1 Fonbl. 74.132

A Contract which is void can never be ratified; as it is a nullity.

A re-execution is not a ratification, but a new contract.

Lecture 6 –
– Gould –

Time & manner of avoiding contracts by infants.

12 Co. 12 –
1 Pow. Con. 216–23
3 Mod 229
12 E. 197
243

If an infant having conveyed by fine or recovery would avoid the conveyance, he must do it during infancy and not at coming of age. The ~~in~~ proceedings must be reversed by writ of Error. And as the conveyance is matter of record no averment to be tried by a jury can be admitted against the record. The reason of the rule according to Powell on Contracts rests chiefly upon the ground of public convenience – that the proceedings judgments in a court of record should not be lessened &c –

Notwithstanding –

Parent & Child

With regard to the conveyances of infants by matter in pais, i.e. not by matter of record, as feoffments, releases &c. the rule seems to be settled that they cannot be avoided until after the infant has attained the age of twenty one years. Because the act done to avoid such conveyance would itself be insufficient, & leave the first act as before merely voidable.

3. Burr. 1808 —
3 Bac. 136 —
1 B. R. 579
2 T. R. 161 —
Contra
Fitzh. Nat. Brev. 192 —
1 Inst. 247. b
248 a 380 —

If an infant makes a lease for years he cannot avoid it till attains full age. While he continues an infant it binds him and cannot be avoided by him.

2 T. R. 161 —
3. Bac. 137 & 8
Contra
2 Bulstrode 69
1 Inst 380.

Exempt Cases in Equity

Marriage settlement agreements, if made with the consent of parents or guardians, with infants are in most cases binding in a Court of Equity but are not binding in Law. —

3 atk. 56 —
1 Brown's Chan. 152
1 Pow. Con. 42 to 44

If agreements of this kind were to be enforced in a Court of Law, they must be enforced unconditionally and in toto, in which case they might operate greatly against the infants. But a Court of Equity in consequence of its own rules of proceeding, will enforce agreements of this kind made by infants, so as to operate to their advantage. And in general such agreements are binding in Equity —

But if asked by what authority the Court of Equity thus proceeds, it will be answered The Court of Equity has power to exercise a sort of discretionary control over all

3 Atk 613
Barnardiston's Chan. 117 —
1 Brow. Chan. 111
2 Vernon 501 —
4 Cruise Dig 19 —
note

Parent & Child (4)
1 Pow. Con. 44 to 46
9 Mod. 101 —
1 P. Wms 574 —

all cases of infancy — Chancellor as has been before observed, is considered as guardian paramount to all infants in the Kingdom.

5 Browns Parliamentary Cases 507
2 Eq. Ca. Abr. 101 pl. 2
1 Bro. Chan. 53
1 Eq. Ca. 55

Again — It seems fully settled at this time that an infant female may bar her right of dower, by accepting under a marriage settlement a jointure by way of dower, tho' it may consist of personal property. Taking it for granted all agreements here spoken of as made by infants are made with consent of parents or guardians, as this is the general rule —

Qu. whether a male infant can thus bind his real estate is said by Fonbl. not to be settled. It is said in Cruise that he cannot — But I cannot see the reason why he should not be equally as able to do so as an infant female.)

2 Chan. Ca. 211
1 Pow. Con. 52 —
Stra. 604
2 P. Wms 229 —
1 Fonbl. 68 to 70
Contra
4 Cruise Dig. 19 —

There is one case of an infant male's possessing an estate for lives, who made a marriage settlement & it was decided he was bound by it. —

2 Atk. 613, 615
1 Browns Ch. Cas. 116. 4th Ed. 510
3 Wood. 453 note
4 Cruise Dig. 17 & 18.

With regard to the bond of a female infant to her intended husband &c (see 2 P.Wms 243 — & other authorities on the margin

1 Fonbl. 70
3 Atk. 156 —
3 Bro. Par. Ca. 514

At any rate it has always been agreed that the contract of a female infant which shall be binding must be made before marriage.

2 Bro. Cha. 345
1 Fonbl. 79
4 Cruise Dig. 19 —

But whatever may be the rule as to a male infant's binding his own property, it has been settled that when the male infant relinquishes certain rights to the property of his wife he shall he shall be bound by such agreement. And further, in none of the cases will the agreement made by the infant be enforced by the Court of Equity, unless it appears to them to be fair & reasonable.

Parent & Child
2 P. Wms 244
1 Bro. Char. 115
116 - 152
1 Fonbl. 69-70
3 Atk. 613

If an infant capable of making a will bequeath personal property for the payment of his debts, the executor is bound in Equity to pay those debts, tho' the infant himself was not liable for them — By reason, that, if the infant has power of appropriating his own property, & bequeaths a certain fund for the payment of his just debts, Equity acknowledging the power & regarding the disposition as perfectly just, will consider the executor as trustee for the Creditors.

2 Eq. Ca. Abr.
282
1 Pow. Con 37
1 Mad. 403
1 Fonbl. 74

I have before observed that in a Court of Law, an infant after coming of full age may ratify his voidable acts done during infancy —

In Equity a contract made for an infant by another person, may be impliedly as well as expressly ratified by the infant after coming of full age. This division of the Title which respects the Privileges and Disabilities of Infants with regard to Contracts is now closed — And we come now to consider what powers an infant may execute

1 Atk 459
3 Bac 149

Parent & Child

What powers an infant may execute. By a power, as here used, is meant a delegated authority — delegated by one person to another. — The enquiry is then — what authority an infant may execute.

1 Vesey 298
304
3 atk 695

It is a general rule that an infant cannot exercise a general power over real estate, because the due exercise of it depends upon discretion, which the law always supposes an infant to want.

3 atk 710
714 forwards
1 Inst 52
Pow. on Powers
43 & 48

A naked special power he may however, execute, because it involves the exercise of no discretion.

E. G. A gives a power of attorney to an infant to convey his (A's) house & lot to B. and his heirs forever, or for years &c — the conveyance thus made by the infant is good. Because no discretion is left in the infant in executing the power, & he is, as it were, a mere conduit-pipe.

1 Vesey 300
Pow. on Powers
43

But an infant cannot execute a power over his own inheritance. Because he would thus evade the disabilities the law has provided for his own protection.

3 atk. 710.
1 Vesey 304 —

Lord Hardwick's Rule —
True rule

From rules already laid down it seems to follow that an infant whose interest is not to be affected by the power may execute it so as to be binding on those who are interested, pro-

vided

provided no discretionary power over real estate is therein) given. 1 Vesey 311)

The question may arise,— can an infant execute a power over his own personal estate? He may execute a general power over his own personal estate, tho' his own interest is affected by it, provided he is old enough to dispose of personal property. At the age of seventeen years he can dispose of personal property by will, tho' he cannot dispose of Real Property till he arrives at full age.

1 Vesey 303
Powell on Powers 54

When an infant tenant for life with a special power to make a jointure, covenanted to make a settlement on his wife for her life, the settlement was held good; the power being special—

1 P. Williams 229
Chra 611)

Lecture 7.
(Tuesday)

What offices an infant may hold.

Upon this subject the general rule is that an infant may hold a ministerial office which requires only skill and diligence, but he cannot hold a judicial office. The offices of steward of a manor, Deputy Sheriff &c are ministerial offices and not judicial & may be exercised by an infant—

1 Inst 3b
Cro. Eliz. 636-7
Com. Dig. tit. Officer 63

The reason why an infant may hold a ministerial is that if incapable of exercising it in person he may do it by deputy.

11 Co. 4. a
Cro. Car. 279.
536.
2 Rolls Abr. 153
4 Mod. 279—

In a ministerial office almost any kind of estate may be holden. And

Parent & Child
Cro. Eliz. 136

And I take the general rule to be, that an infant can hold no office except such as can be executed by deputy —

Suppose the right to an office should devolve to an infant of the age of four years, he could not execute the office himself and if he could not by deputy, clearly then, he could not hold it at all.

I suspect there is no instance whatever in Con. of an infant's holding a civil office

It does not at present occur to my recollection that any other office in Con. can be executed by deputy except that of sheriff; and it is impossible that an infant should derive a right to this office from any ancestor, as the appointment comes from the Govr. & Council —

Hob. 325
3 Bac. 125 —

At Common Law an infant cannot be appointed an attorney; because he cannot take an oath, nor can he be a juror, because it is an office in some degree judicial. —

5 Co. 27. a
8 Co. 44. b
Mod. 364 b
3 Mod. 222 —

An infant, holding an office which by law he may hold, is regularly bound by his acts in that capacity, and is liable for all the breaches of duty for which he would be, were he an adult.

Tho' the law allows an infant to hold an office for his benefit, yet it renders him liable for all breaches of duty, in executing it, for the sake of the public —

Parent & Child

How far an infant is affected by non performance of conditions annexed to his office or estate—

1 Inst. 246 b
8 Co. 44.
2 Vern. 580
333. 343—
2 Lev. 21—
1 Vent. 199
Carthew 43

In the first place— By an express condition an infant is regularly bound like an adult. If, then, an infant holds an estate containing an express condition imposing forfeiture, the infant forfeits by nonperformance of the condition.

Suppose a lease be made to an infant upon condition that if he neglects to pay the rent at any particular time he forfeits the lease. A breach of this condition is binding upon the infant, & forfeiture is the consequence. The person making the lease has such absolute control over the property, that it would be absurd that the privilege of the infant should stand in the way of the disposal of it—

There is, however, one exception to this rule— If the condition imposes a penalty in addition to the loss of the estate, the infant is not bound to the performance of the penalty— That part relating to the penalty is void. The rights of the lessor do not require it—

1 Inst 246. b
1 Vent. 200
Carthew 43

What has been said will be understood as relating to express conditions—

There are implied conditions, founded in skill & confidence, and—

Paynt & White and those not founded in skill and confidence.

Sh. 44 b
1 Inst 233 b
1 Fonbl. 82 n z
10 Co. 55 b

By conditions founded in skill & confidence impliedly annexed to an office the infant is bound & forfeits for a nonperformance. He may forfeit his office in general for any mismanagement & neglect, as an adult would.

Sh. 446. b
1 Roll. 851
1 Inst 233 b

But by implied conditions not founded in skill and confidence, which are generally annexed to an estate, as contradistinguished from an office, an infant is regularly not bound.

Hob. 314
1 Inst 54 a
Fitzh. Nat. Brev. 59

As to conditions implied by statute law, the general rule is — When the statute gives a recovery for nonperformance of the condition, the infant is bound by it —

As the statute of Gloucester gives an an action for the recovery of the place wasted & also damages, the infant forfeits the estate by commission of waste.

At Common Law there is no forfeiture for committing waste.

Sh. 446
1 Inst. 233 b
1 Fonbl. 82 n z

When the statute for violation of an implied condition gives merely an entry and no recovery, an infant is not bound by breach of the implied condition.

1 Lev. 31
1 Eq. Ca. Ab. 384
Prec. in Ch. 518

Infants are barred by statutes of limitation, unless expressly excepted. But there is almost always a saving in Con. as well as English statutes in favour of infants, femes covert &c.

7

And if an executor or administrator or trustee for an infant, does not sue within the time prescribed by a statute of limitations, he having a legal right so to do, the infant is barred; the saving in the statute in his favour notwithstanding.

This rule must be understood as being confined to those cases in which the action must be brought in the name of such executor &c in his own right as such. The infant has his remedy on the executor &c— 3 P. Wms 309.

3d What manner infants are to sue and be sued.

1 In what manner an infant may sue
2 How he may be sued.

1st As to the manner of suing the rule is he must always sue by his guardian or prochein ami, i.e. next friend.

When an adult sues he must appear himself or by attorney. The infant can appear in neither of these ways, as the law considers him deficient in discretion — nor can he ~~execute~~ make a power of attorney. Palmer 225 2 St. Kirby 409 420

It follows then that there must be a provision that he may appear in some manner in maintenance of his rights. Hence the rule above. 3 B. 301 Palmer 296 1 Inst 135 b Cart. 123

If an infant does sue in his own name, or without his guardian or next friend, the defendant may plead his disability and thus defeat

Parent & Child

Cro. Jac. 640
Palmer 295
Kirby 409
Stra. 709

defeat the action.

By the ancient Common Law, an infant could not sue by his next friend but by guardian only –

By stat. Westminster 1 & 2. infants are enabled to sue by next friend in all cases of necessity, but except in these cases they must sue by guardian. These cases of necessity are four –

Cro. Jac. 640
Hutton 92

1 When it is necessary for the infant to sue the guardian himself which case may occur, he may do it by prochein ami or next friend; as it would be absurd to make use of the name of the guardian in an action against him the guardian –

2 When the suit is brought against a stranger and the guardian tho' consenting to the suit will not appear for the infant, he is then to sue by his next friend.

Palm. 295
Cro. Jac. 640
Stiles 309
Kirby 409

The words "tho' consenting" are emphatical, for the guardian may prevent the infant from suing at all. When the infant sues by prochein ami the consent either express or presumed of the guardian is necessary.

1 Inst. 135 b. note

3 An infant may sue by his next friend when he has no guardian. It may be necessary for an infant to institute a suit before his guardian is chosen &c –

Cro. Jac. 640
2 Bac. 680
Palm. 295

Lastly – When an infant, having a guardian is eloigned from him, i.e. out of the reach of his of his care and protection, he may sue by his next ~~frien~~ friend.

According to some opinions an infant may in all cases sue by his guardian or next friend at his election. But I apprehend these opinions are incorrect. Otherwise for what purpose was the statute of Westminster made &c. Hutton 92 / Inst. 135 b / Cro. Car. 86.

These rules relate to infants in general. But if husband & wife sue, the former being an adult and the latter an infant, the husband alone may appoint an attorney for both. 2 Saund. 213

When an infant sues by guardian, the guardian is liable for costs and is compellable to give security for them. The case is the same with next friend. 1 Eq. Ca. abr. 72 — Atk 506 / 1626 — / 1 Wils 130 — / 1 T. R. 491 —

The guardian or next friend, as the case may be, does not ultimately lose these costs, but when he settles with the infant is allowed all necessary disbursements.

There is an instance in chancery in which an infant is held liable in the first instance for costs. This rule was afterwards denied by Lord Kenyon. — Costs were first allowed by statute. Common Law allowed no costs, but plff was liable to amercement pro falso clamore, which was a substitute for costs. 2 P. Wms 298

An infant plaintiff is never liable for cost, as laid down by Lord Kenyon. Stra 708 / Cro. Eliz. 33 / 1 Bulst. 109 —

Parent & Child
Cro. Car. 166
1 Wils 131
2 Eq. Ca. Abr. 238
Mitf. Plea. in Chan. 26.
2 Stra. 1217
Say. Costs 193.

Lecture 8.
Gould

Stra 1217
1 Salk. 189
Dyer 104

Kenyon, otherwise property of the infant would be placed in great danger.

And if costs are awarded against an infant it is error.

An infant Deft when judgment goes against him, is always liable in the first instance to costs, in the same manner as an adult. An infant pltf. is not supposed to direct or control the suit. But when judgment goes against an infant defendant he is always supposed to be in fault — Indeed the suit almost always arises ex delicto. It is not the fault of the guardian or prochein ami.

Stra 304. 709
Ld Ra. 232
Carth 156
3 Atk. 603

It is the practice in England for the Executor or prochein ami to be admitted to prosecute for the infant by the Court; & it is so entered on the record, or by writ out of Chancery; by reason that they may be improper persons.

Kirby 415
419

But in Conn. it is a general rule, that when an infant sues by guardian the Court never enquires into his qualifications — he prosecutes of course. But if the action is brought by infants next friend, he is to be formally admitted by the Court as in England. The reason is that the law reposes confidence in the guardian as a proper person but the situation of the next friend does not entitle him to such presumption in his favour. To be sure if the guardian should be shewn to be an improper person the Court would take notice of it & act accordingly — And

the rule

And the rule both in this country and in England is that any one as next friend may bring an action for an infant, and this may be done without his consent; and hence the propriety of ascertaining whether he be a proper judicious [illegible].

2 Bac. 680
1 Eq. Ca. Abr. 72 —
Kirby 411 —

The result of the law upon this head then is that any one may commence a suit for an infant, but it depends with the Court whether they will dismiss him or not.

If an infant and an adult are executors, they may appear by attorney – the adult may appoint an attorney for both. But if an action is brought against such executors the adult cannot appoint an attorney for both, but the infant must appear by guardian – Because the infant may deny that he is executor and defts. might have been utter strangers. But when they sue they acknowledge themselves joint executors.

1 Roll 288
Cro Eliz 278
541 —
2 Saund 212
213 —
1 Vent. 102
Ld Raym. 232
600. 1449 —

It has indeed been said also, that when an infant is sole executor, & brings his action as such, he may appear by attorney, but this is contradicted by more modern law. The true reason why he cannot appoint an attorney is that he is considered as wanting discretion.

Cro Jas 420
441
Carth 123
2 Saund 213

Thus far with regard to infant plffs except in our two cases last mentioned by way of contra-distinction. I am next to consider how infants are to be sued –

Parent & Child
17

How infants are to be sued. —

An infant defendant must always appear by guardian — he cannot appear by next friend, and neither as plff or deft. can he appear by attorney. The reason is that Stat 1 & 2 West. do not extend to actions brought against an infant, and therefore the old common law rule remains that he must, when he is sued, appear by guardian. And whatever plea infant defendant makes must be signed by his guardian —

Salk. 225
2. 50 ——
1 Bac. 680.
1 Cro. Jac. 640
Hutton 92
Hob. 266.

Though in an action against husband and wife she being an infant, she must appear by guardian tho the husband is an adult. I have some doubts about this rule, tho I do not find it any where denied.

1 Roll. 288.
1 Vent. 185
2 Keble 878
1 Lev. 91. 160

Supposing this rule, then, to be law, there is perhaps a reason for the distinction between this case & that where the husband & wife are plaintiffs. An infant plaintiff may sue by next friend, but an infant defendant cannot appear by next friend. The husband is considered as his wife's next, & as next friend may appoint an attorney, he as such may appoint an attorney when he and his wife are plaintiffs — But an infant deft. cannot appear by next friend & therefore husband has no power to act for her —

If an infant is sued & has no guardian, the court must appoint a guardian ad litem as it is called, i.e. for that particular suit —. This is usually done by motion from the plaintiff —

It is for

Parent & Child
13

It is for his interest in order that judgment may be valid that this should be done. It is therefore, his duty to suggest to the Court the infancy of the defendant &c — This guardian so appointed is usually some attorney at the bar

5 Co. 53. b
2 Lev. 133 –
1 Inst. 89. 135 b
3 B. 427 –

If the infant has a general guardian the Court cannot appoint a guardian ad litem, unless the general guardian is out of the reach of process, or has misdemeaned himself (in the language of the rule) i.e. shewn himself unworthy to be entrusted.

1 Sid 424
Stiles 456 –

When an infant is sued the process should be directed as well to the guardian as to the defendant himself, i.e. the sheriff should give notice to or summon the guardian to appear for the infant. For an omission, however, of this notice, the suit will not abate, but time will be given, that the guardian may have notice — This regulation is very necessary, for the plaintiff may not know, who the infant's guardian is or he may not, even be apprised of the infancy of the defendant himself at the time of bringing the suit. This is the rule in this country & I presume the law is the same in this respect in England. –

If an infant sued appears by attorney & his plea is signed by his attorney & judgment is given against him it is erroneous – It is an error in fact

Parent
Child

infancy, not appearing on the face of the original record.

Cro. Jac. 640
Hutton 92
Yelv. 158
2 Bac. 218

The writ of error brought in this case is called both coram nobis and coram vobis, but I think coram nobis most proper as it issues from the Court who rendered the original judgment.

Kirby 110.

So also if an action be brought against an infant and judgment goes against him by such default, it is erroneous – The guardian should have been summoned in –

If an infant plaintiff appears by attorney and judgment goes against him, the judgment is also erroneous in this case – So it would be erroneous at Common Law if judgment was rendered in favour of the infant.

Cro. Jac. 441
(580)
1 Bac. 93
2 D° 198

But stat. 21 James 1. makes judgment valid if given for the infant plaintiff upon verdict.

2 Bac. 198
228
Cro. Jac. 289
1 Roll 776
Carth. 367
3 T. R. 435

If an infant sued with others who are adults, appear by attorney, and whole damages are given against them, it is erroneous against the whole. But if damages are given against them severally, it is doubtful whether the judgment would not be good as to the adults, tho' erroneous as to the infant. Indeed reasoning analogically, I think, it would be good as against the adults. Because it is a general rule

5 Co. 58
Sid. 189. 808
4 Burr. 2022

that when the parts of a judgment appear to be severable, it shall be reversed as to that part only, which is distinctly erroneous—

Parent & Child

Also in Con. it has been determined that when an adult and an infant have been sued together for wrong doing, judgment is erroneous only as to the infant, tho' entire damages are given. This I think is perfectly reasonable as there is no contribution in this action i.e. the adult might have satisfied the judgment, yet could have recovered nothing of the infant, or the action might have been brought against the adult alone, who would have been answerable for the whole.

Kirby 116

2 Bac 229
Hob. 278
Cro Eliz 115
124
2 Leon. 108

In England if an infant & an adult join in levying a fine, it is erroneous as to the infant only, for the interest of the two is distinct. This falls in the principle of the general rule that if an adult & an infant join in a contract, the former is bound tho' the latter is not.

Next we shall consider how far the law regards infants in ventre sa mere. Upon this subject the law has undergone considerable changes—

Infants unborn, or in ventre sa mere, as it is termed in Law French, are, as to many purposes considered in esse, and now as to many purposes to which they were not formerly so considered—

1 B.C. 130

The killing of an unborn child is not now considered a murder, tho' if wilful, it is a great misprision, Misprision

Parent & Child — 4 Bl. 198 — 1 Hawk P.C. 121 —

prision, as the word is here used, means the highest sort of misdemeanours — misdemeanours meaning that sort of crimes which fall short of felony)

4 Bl. 197-8 1 Hawk P.C. 121 Com. Hale P.C. 433

But if an unborn child, having received a mortal injury, is born alive & within a year and a day from the time of the injury &c. of such wound or injury, it may be murder, i.e. if the circumstances were such as would have constituted murder, had the child been born at the time of the injury.

2 Bl. 208 — 1 P. Wms 486-7 (Doug. 481 note) 5 T.R. 60 — Ib. 95a 99a Hob. 3 —

An unborn child may also inherit an estate from an ancestor. The estate descends to the heir presumptive, but is divested on the birth of the child.

Fearn. on Con. Remainders 429 432. 1 Inst 11 b note 4. 4 Burr 2157 — D.R. 64 —

So also as the law is now settled such an infant may take an estate by devise or legacy. 2 Wils 225 — 1 Bro. Cha. 386. — 5 T.R. 49-57 1 B&P 243 — 1 P. Wms 486.

2 Mod — 9. 1 Vesey 114 1 Bro. Cha 386 5 T.R. 49-57

The estate descends to the heir at law & continues in him by descent till the birth of the infant.

2 P. Wms 446 Barnardiston 290 2 Atk 117 —

Such an infant may also take a distributive share under the statute of distributions.

Precedents in Chan. 50. 1 P. Wms 246 — 342. 2 H.B. 399 —

So also under a term or other trust for raising portions for such children as A. shall have living at the time of his decease, A's posthumous child shall take —

And an injunction against waste will lie in behalf of such an infant, and the Bill is brought by his next friend.

Parent and Child

Prec in Cha. 58
2 Vernon 710. 711
2 Atk. 114

Under statute 12 Car. 2 such an infant may have a testamentary guardian appointed i.e. the father may appoint a guardian by will.

1 B. C. 130.
462-466

An unborn infant may be an executor tho' he cannot act as such till the age of seventeen years, and if there should be two children at a birth, they are joint executors — The rule is analogous with regard to devises &c — Should there be two children at the birth they take the estate jointly —

Lecture 9

Relative Rights & Duties of Parents & Children —

The inquiry under this head renders it necessary to consider the distinction between legitimate & illegitimate children, because these rights & duties are different with these different classes of children. The question then arises who are legitimate, and who are illegitimate children. A legitimate child, is defined to be one born in wedlock or during a competent time afterwards — This definition, I do not think complete — it amounts to no more than this that no other than a child thus born is legitimate, but it is not universally true that one is legitimate who

1 B. C. 446
1 Inst 244
Cro. Jas. 541

Parent & Child who is so born. It amounts to this that
a child thus born is prima facie le-
gitimate.

1 Bl. 454 An illegitimate child is defined
to be one neither begotten nor born
during lawful wedlock. This definition
is as I conceive incomplete. For
suppose the parents intermarry between
the time of conception & the time of
the birth of the child and the father
die before the birth, the child clearly
would be legitimate, tho' this would
not come within the last rule.

I think an illegitimate child may
properly be defined to be one that is
neither begotten nor born during
lawful wedlock, nor born in a
competent time after matrimony.

5 Co. 98 Anciently, when a child was born
1 Inst. 244 during wedlock, or within a compe-
2 Stra. 176 tent time afterwards, no other proof
1. 940 of illegitimacy would be admitted
Salk. 123 except that of the absolute impossi-
1 B.C. 457 bility of legitimacy. And this must
have been proved either first by
proving impossibility of access by the
husband, or 2d physical impotency.

1 Inst. 244 1. As to the mode of proving nonaccess.
1 Roll. 358 Anciently the only mode of proving
1 Bac. 310 this was by proving the husband's ab-
& 311 sence extra quatuor maria from
Cuth. 122 the time of the conception to that
Ld R. 395 of the birth of the child.
Salk. 122 & 3
483
1 Inst. 244 a Salk. 122. 484

Parent
Child.

The consequence of this rule was that if the husband were absent beyond sea for any length of time and immediately after his arrival in the kingdom his wife should be delivered of a child, it would be his heir — his child.

1 Bac 310
1 Roll 358
1 Inst 244
1 B.C. 447.
as [illegible] impotency &c

We have no such rule in Con. that impossibility of access should be proved. And in England the rigor of such rules are at present very much relaxed. The fact of nonaccess may be proved without proving that the husband is absent beyond the four seas. Nonaccess can now be proved like any other fact —

3 P. Wms 276
5 Mod. 419
Stra 925

Impotency may now be proved by different evidence from what was anciently required. The inquiry is now a very liberal one with regard to every fact which can constitute any evidence to that effect.

Stra 940
Esp. Dig 483

Long after the rigor of these rules was relaxed, still it was holden that no other evidence than nonaccess or impotency, could be admitted to rebut the presumption of legitimacy in favour of a child born during wedlock or within a competent time afterwards. But the rule is now different. This presumption in favour of legitimacy may now be rebutted by evidence of any fact which

Cow. 594
4 T R 358
Cowp 484

Parent & Child

of any fact which shall tend to disprove it.

Proof that the mother cohabited with another person will be admitted — Indeed the presumption may be rebutted by strong probability like any other presumption —

The issue of a marriage which is ab initio null, is illegitimate.

1 B. 435-
456-440
7 Co. 41.
4 Bac 311.

So also, if after the child is born the parties are divorced wholly, a vinculo matrimonii, for causes existing before the marriage & rendering the marriage unlawful, such issue is illegitimate.

But the legality of a marriage not absolutely void cannot be called in question except during the lives of the parties — This is founded upon reason wholly ecclesiastical. And

1 B. 440.

upon this rule is founded the axiom in Law that the issue cannot be bastardized after the death of the parents — The meaning of the axiom is that the issue cannot be thus bastardized if born during wedlock or in a competent time afterwards.

Salk 123
7 Co. 47
Stra 925
4 T.R 356

A child begotten and born after the mother is divorced a mensa et thoro is presumed to be illegitimate. This is the legal presumption tho' the child may be legitimate. But if after voluntary separation of man & wife, the child is begotten & born

Parent & Child

and born, the presumption in law is that the child is legitimate. But the presumption in both these cases may be rebutted.

Coup. 594
Bul. N.P. 112
1 Wils 340

When the question as to the legitimacy of the child depends upon that of access, the wife cannot be permitted to testify to non access, tho' she may not be interested. This rule is founded upon principles of decency —

But she is allowed to testify to her own incontinency — Here the principle of decency yields to that of necessity — upon the presumption that no other person would testify to the fact.

Coup 594

Upon such a question, the father is competent to prove the time of the birth of the child — Either of them as the case may be is allowed to testify to the birth of the child & marriage —

The declaration out of Court of the father or mother as to the child's birth, may be admitted as proof after their death, to prove that the child is illegitimate as having been born before their marriage —

Coup 594
Peake's Ev. 11 & 12
Bul. N.P. 233
294
[illegible]

An answer of the parents in Chancery in any former case with regard to the legitimacy of the child is good evidence.

So also oral tradition, common report, record in a family Bible in-

scription

Parent, Child

scriptions upon tombstones, and other memorials of this kind are evidence to prove the time of the child's birth.

1 Roll 624
1 B. C. 454. 456
6 Co. 65

By the Civil & Canon laws of Rome which generally obtain on the Continent of Europe, the child born before marriage is legitimated by a subsequent marriage of the parents.

Cro Jas 541
1 B. C. 456

A Posthumous child must have been born in such a period of time after the death of the mother's husband, that by the usual course of gestation it might have been his issue.

Co Litt 123
b note 1 & 2.
1 Bac 312
1 B. 456

Now what is the competent time in the definition the law has not settled. Hargrave, however, in his notes on Co. Litt. has availed himself of Dr Hunter's opinion. Dr Hunter has paid great attention to the subject, & his opinion is that nine solar months and ten days, or 275 days is the average period of gestation.

1 Frust 8
Palm 9
1 Roll 356

The rule on the subject then, is that in such circumstances born within the usual period of gestation is prima facie legitimate. but this presumption may be rebutted.

Cro Jas 541
Co Litt. 8
1 Roll 357

On the other hand, a child born after the usual period of gestation is presumed to be illegitimate, and this presumption may be rebutted - Indeed if a great while after it cannot be rebutted. Thus a child born nine months & 15 days after conception was holden to be legitimate & —

Bul. N.P. 114
Esp. 2 g 485

There is a rule, that if a widow marries immediately after her husband's death, & has a child born at such a period that it may have been begotten by either husband, the child may, on coming of age, choose to which he will be the heir – Tho this case seldom if ever occurs.

Parent & Child

1 Inst 8
1 Bac 312

It is an established rule that no person can be bastardized after his death – But this rule holds only as between an illegitimate child born before marriage and the legitimate issue born after the marriage of the parents.

7 Co 44
1 Bac 315
1 Inst 33 a
245
Salk 120
3 Bur. 410

If then a son is born before the parents intermarry, & they afterwards marry & have legitimate issue, and on the death of the father, the elder son who is illegitimate enter upon the estate & die seised, his issue will take before the other legitimate son. To secure this possession however, there must have been an uninterrupted possession in the illegitimate and a descent cast upon his issue –

1 Roll 624
1 Bac 316
1 Inst 244.

Lecture 10.

I now proceed to consider the rights & Incapacities of bastards or illegitimate Children –

The rights of an illegitimate child are such only as he can acquire – He can inherit nothing from an ancestor, as he can have no ancestor. He is said to be

nullius

Parent & Child

nullius filius, & to be related to none but his own issue.

5 Mod. 168. Ld R. 68. Comb. 365 Comyns Rep. 2 1 B.C. 458-9 The maxim that he is nullius filius is not universally true.

An illegitimate son is not allowed to marry an illegitimate daughter of the same mother. It will be incest if he does. It is not therefore universally true that he is related to no one but his own issue. Nor is this general proposition of the law true in relation to those provisions of statute law which require the consent of parents to the marriage of children.

1 T.R. 96. If an infant illegitimate child marry without the consent of the parent the marriage is void.

Lit. Sect. 188 1 Inst. 123 1 T.R. 101 1 Bac 309. Indeed this general maxim of the law that a bastard is nullius filius applies only to the cases of inheritancy. The rule is founded upon his incapacity to inherit. On this account he is nullius filius, or quasi nullius filius.

1 Inst 3 1 B.C. 458-9 And in pursuance of this maxim an illegitimate has no sirname by inheritance. He can acquire one in no other way than by reputation.

Cro Eliz 510 Prec Ch 338 6 Co 65 10 Mod 529. And this sirname acquired by reputation, can be acquired only by continuance of time. The reputation that he is the son of John Stiles must have continued some time before he can acquire the sirname.

But having acquired a sirname by reputation he may become a purchaser by the by the name thus acquired.

Parent & Child

Thus if he has acquired the name of John Stiles by reputation as being the son of John Stiles, a devise to him by that name will be good for he will take by the description "Thomas Stiles the son of John Stiles".

1 Inst 3
Perk. sec 25
1 Atk. 410
1 Sid. 194
Pow. Dev. 338
6 Co. 65

But an illegitimate child can never take under such a description as this "the issue of John Stiles". It appears to me the rule is carried too far. Although the word issue in general amounts to the same as heir of the body, & an illegitimate cannot be heir. Yet both expressions are sometimes used by way of description & not limitation, on which account I think the rule too broad.

1 Inst 3b

If a contingent-remainder is limited to the eldest unborn son of John Stiles, whether legitimate or illegitimate, & he afterwards have an illegitimate son, such son cannot take. Because in consequence of the rule previously laid down, the child has not at the time of his birth the reputation of being the son of John Stiles, and it is uncertain whether he ever will acquire it. Therefore the contingency is said to be too remote.

6 Co. 65
1 Inst 3b
Cro. Eliz. 510

It is said, however, that if such a limitation be made to the eldest

unborn

Parent & Child

3

1 Roc. Nov. 33. 35.

unborn son of Jane Stiles, whether legitimate or illegitimate, it will enure to the benefit of her after-born illegitimate son. Because he acquires the reputation of her child by being born, & then can be known for certainty.

It is, however, doubtful, as to both these branches of distinction, whether they are correct.

If the uncertainty of the person is the only objection to the illegitimate's taking, it is undoubtedly removed in the latter case. It seems doubtful, however, whether this uncertainty is really the ground of objection. It is said that ~~the~~ event of the birth of an illegitimate child is too remote a possibility for the remainder to vest. The question must be determined by authority.

10 Eliz 516
2 B. C. 770.
1 P. Wms 529.

I am myself inclined to believe the true rule to be thus— a limitation to the unborn illegitimate child either of a man or woman is void— Because I think the genius of the Common Law of England is averse to a future provision for illegitimate children— Tho' I do not pretend to say whether the policy is a wise one or not.

1 B. 459.
1 Inst. 3

An illegitimate child can have no heirs except of his own body. All other kindred are traced to a common-mon ancestor, and for the purposes of inheritance he can have no ancestor, tho' G. is for some purposes considered as related to his parents.

Parent & Child.

Another consequence of the general maxim of law, that an illegitimate child is nullius filius, is that his settlement is regularly in the parish where he is born.

Salk 427
1 B.C. 459
362 2 B.

Thus where the mother lives in the parish of B. and the child is born in the parish of A, it becomes the duty of the parish of A to support the child (ie provided parents cannot), tho' for the purpose of nurture it may live with the mother at B. for a certain time, generally said to be 7 years, during which time it cannot be taken from the mother against her consent. During this time it must be supported by the parish of B.

But though the rule is general that the illegitimate has his settlement in the parish of his birth tho' different from that of the residence of his mother, there is an exception — If there is any fraud on the part of the mother of the parish to which she belongs, in bringing the birth in another parish, the settlement of the child will then be in the parish to which the mother belongs.

Salk 121
1 B.C. 459

The rule

Parent & Child

The rule that an illegitimate child cannot inherit from his parents, is the same, I take it, in Con. as in England —

1 Swift 169
1 Root 175

Under our law however, in Con. the settlement of the illegitimate child is in the same place with that of the mother — which is an exception from the English Law upon the subject —

The duty of parents toward their bastard children requires a consideration by itself —

The duty of parents toward an illegitimate child consists chiefly in their

1 B.C. 457 —

obligation to maintain it — Both by the English law & our own the parents are bound to maintain their illegitimate offspring —

1 Bac. 317
1 B.C. 458.

The natural relation between them is in this case acknowledged, tho' not for civil purposes —

The mode of enforcing the duty of maintenance is somewhat different in Con. from what it is England. It is regulated by statute, as well there as here.

In Con. a remedy is given as well to the mother as to the town in which the illegitimate is settled.

Parent
Child
Lecture 11.
1 B. 446

The reciprocal rights & duties of parents and their legitimate children.

The duty of parents to their legitimate children consists in the three particulars of maintenance, protection & education.

The duty of maintenance is founded in natural law & consists in providing children with necessaries — Raym. 500. 1 B. 446.

The obligation of parents, when they are able, to support their infant legitimate children is absolute and unconditional. For in judgment of law, a minor child is never able to support himself. 1 Bro. Cha 268, 387. 1 Vesey 160. 3 Atk 399. 1 Swift 204

This duty is inforced in England by Statute 43 Eliz. & in Con. by a statute of the state. 1 B.C 448. Stat. Con 232

And this obligation extends as well to parents as to grand parents — It is not indeed so intirely absolute & unconditional in the case of grand parents as in that of parents.

It is provided that all persons who are poor, impotent, or through want of understanding, or age are unable to support themselves, they shall be supported by their parents or grand parents if they are of ability so to do — 1 B.C. 448 & 9. 1 Swift 204

But parents & grand parents are not bound to this duty, if their adult children are able to support themselves, but if they are not so able, the duty continues. 1 B. 449.

And

Parent & Child

Con. Stat 232
Swift 2 .4

And on the other hand, the same obligation rests upon the children & grand children in support of their parents & grand parents — If the parents or grand parents are unable to support themselves, the child or grand child if able is bound to support them, by the statute of Con.

Stra 190 -
2 Bulst 345 -
Sid. 283
1 B. 3 454.

The same is the duty in England of children to their parents, but as grand children are not mentioned in the statute, it would seem that the obligation on the part of the grand children is intentionally omitted. The conclusion is that grand children are not bound to support their grand parents by the English Law.

Stat Con. 343
342

It will be observed from the rules laid down, that the obligation of Towns in Con. and of Parishes in England to support their paupers is merely secondary. If they have no relations who are by statute made liable for their support, or if, having such relations, they are not able to support ~~them~~, then it becomes the duty of the town or Parish.

There is no obligation on the part of the grand parents so long as the Parents are of ability to support their children; nor, on the other hand are the grand children under obligation, so long as the children are able to support their parents.

If a man marries a woman who has

Parent & Child

2 Ld R. 1454
4 T. R. 119
3 Esp. R. 1.
Stra 190. 955.
Kirby 156

children by a former husband, & if they are minors, he is bound to support them & is entitled to their services, during their minorities.

But I do not think this rule to be law. In England it is settled that he is not so bound in this case, whatever may be the circumstances. But I doubt whether this rule in its full extent is upon a true principle.

I apprehend the true principle to be this, that if the mother, at the time of the second marriage was able to support her infant children then the second husband should be bound to support them —

If the wife at the time of the marriage is in debt, the Husband is liable for those debts & as a general rule, takes her cum onere — Then it seems to me to be manifestly inconsistent & unreasonable, that the mother, who is bound to support her infant children, should be able by her marriage to cast them upon the public for support, for when married she could no longer herself be liable, hence I think it reasonable that it should be the duty of the Husband to support them provided, the wife was able previous to the marriage, as he has the control of her estate. —

It is the rule as well in England as in this

Parent & Child

1 Stra. 190.
2 Bulst. 345.
1 Keb. 250.
361.
Kirby. 155.

as in this state (Qu) that the husband is not bound to support the wife's parents, as the relation is only that of affinity. It may however be from the principle that the husband does not take the wife with such an expectation &c for the sake of quiet in the family &c.

Stra. 955.

It is also settled that a man is not bound to support his sons wife after her divorce from him a mensa et thoro, from which I think, it would be inferred, that he would be bound to support her, were her husband a pauper, before such separation took place.

Suppose the case, where the pauper had both a father and a son both of whom are able to support him. the statute has not directed which shall support him. It seems to me reasonable that they should do it jointly. tho' I know of no case where the question has been decided or even raised.

1 BC. 449.

The law has not interfered with the rights of the parent to dispose of his property as he pleases after his death. He may disinherit his children.

It would be going too far to take away this right, even if there was danger of hardship on the part of the family, tho' I think the danger is small

We have a statute providing, that if

Parent and Child

If a man dies without issue, leaving a widow who is unable to support herself & having no relation able to support her, his property shall be subject to her support in the hands of his collateral heirs, during her widowhood & no longer —

Stat. Con. 984

When the party needing support is an adult, the obligation is enforced by a memorial in the form of a petition to the Court of Common Pleas in the County where the pauper lives. The Ct. in this case exercise a sort of Chancery jurisdiction. —

1 Root 60
2 Do. 168

This application may be made by any of those relations mentioned in the statute, or by the Selectmen of the town to which the pauper belongs.

The relations who by the statute are made liable shall be bound by the Court according to their respective abilities — The proportion being thus assessed, they are ordered by the Court to answer to such assessments & for this purpose executions issue quarterly —

Lecture 12

2. Protection. The duty of protecting one's children is founded on natural law. But this duty, tho' permitted by municipal law, can hardly be said to be enjoined or enforced by it. The Father cannot be compelled to protect his child. The nature of

the

Parent & Child.

1 B.C. 450
2 Inst. 564
or 566

the case will not admit of this compulsion by municipal law. From the permission of the law, however, the father may maintain & uphold his child in any suit & so doing will not incur the guilt of maintenance.

1 B.C. 454
450.
1 Hawk. 131.

This permission between the parent & child is reciprocal. A parent may justify a battery in defence of the child & the child may also do the same in defence of the father.

1 B.C. 450
451 —

3. Education. Parents are bound to give their children suitable education. This is doubtless a natural duty. There is, however, no provision in England to enforce this duty — except in two cases, which bear a little upon it.

In Con. somewhat more of this duty is done. In general, indeed, it is wholly unnecessary to enforce this duty by municipal regulations. The case rarely, if ever, happens that a parent does not both protect & educate his child as far as the law & his means will allow him. In Con. however, the law provides that all parents & masters shall teach children under their care to read the English language well & to know the law against capital offences, or if unable to do this

Parent & Child

this they shall teach them some short orthodox catechism —

For neglect of this law parents are subject to a fine. Stat Con 123

Under that provision of which I am speaking, the Selectmen of the town are authorized to take children from their parents, if they are there suffered to grow rude & uneducated, & bind them to an apprenticeship — They may bind males till the age of twenty one years & females to the age of eighteen.

The duties of children to parents are to obey them during infancy, if of ability, to support them when paupers, & protect them — 1 B.C. 453.4

Rights & powers of Parents over their Children —

An infant child is subject by law to the personal control of the parent. As he is bound to maintain & educate his children, he must of course have power to enforce his commands. Hence the right is founded in the duty of the parent. And, hence the parent's right of correction.

1 Hawk 130
1 B.C. 452 &c

The Common Law of England allows the parent to chastise the

Parent & Child

the child in a reasonable manner for any breach of duty or refusal to perform his duty—

If the parent in the chastisement transgresses all bounds of reason, shewing himself to have been influenced by vicious motives, the child will then have an action for a battery by his next friend, against the Father.

But as the authority of the parent in the article of chastisement correction is discretionary, he is not liable for every slight excess in correction, which may be an error in judgment.

1 Hawk 79
Keling 65.

If the Father in chastising the child happens to kill him, it may be either murder, manslaughter, or excusable homicide.

1 Bl. 453.

This power of correction of the father may be delegated by him to a master, who stands in loco parentis— But the master cannot delegate this authority to a third. From his personal qualities he is invested by the Father with this trust, and the trust he cannot transfer.

The consent of the parent to the

Parent & Child

the marriage of his children under age is required by English Law & that of Con. and without such consent the marriage by the English law is void. 1B. 452 By the law of Con. the marriage is good without such consent, but the clergyman or person who solemnizes the marriage is liable to a fine. Stat Con

But a father has no power over the estate of his infant child, other than as trustee or guardian & is liable as such to give an account of all property which has been in his hands of the child's, when he (the child) comes of age, or as the case may be before! 1B. 452-3 The father, then is not interested in the property of the child— and a minor child is intitled to all the property he acquires otherwise than by his labour or personal service. If a devise &c is made to an infant, the property is exclusive in the infant.

But, on the other hand the father is intitled to whatever he may acquire by his labour or service. 1B. C. 453 1 Swift 206 Because he is the servant of the father. And if a child labour for another with or without the consent of the father, the father is intitled to the wages

Parent & Child

wages & they are payable to him.

And from this right flows the rule that the father is entitled to an action 'per quod servitium amisit' against any one who has beaten or injured his child so as to occasion a loss of his service. This arises not from the relation of

Mo. 113
1 B. 453
Esp. Dig. 645.

parent & child but from that of master & servant. The father is entitled to this action so long as the child continues the servant of the ~~in~~ father.

Peake's Rep. 233

And upon this principle it is that the father may maintain this action against any one who shall entice away his child and thereby occasion a loss of his service.

Cro. Eliz. 55.
Esp. Dig. 64.

And here I would observe, that if the infant is personally hurt, for the corporal injury the child must himself bring an action — and if the consequence is a loss of service for such loss is the parent entitled to an action.

Sir T. Ra. 259
3 Wils. 18.

If, from the injury of the child the parent has incurred any actual expense, as in the cure of a wound &c — he may recover it in the action per quod servitium amisit if he specially alleges it as a ground of damages in his declaration; but if not specially laid he cannot recover it.

Parent & Child

And upon the same principle it is that the parent may maintain an action against any one who has seduced his minor child & gotten her with child. The action is always per quod servitium amisit. The loss of service is the gist of the action — I do humbly conceive that the action cannot be maintained without loss of service — actual or nominal.

Ld R. 1032.
3 Burr. 1878.
2 T.R. 168
1 Bulstr 373
Eliz 769.
770.
8 Mod 127
2 Root 326.

Also any expense that the father may incur during the daughter's illness he may recover if specially laid in the declaration, as in the other case —

Sir T. Ra. 259
3 Wils 18.

Tho' the loss of service is indeed the gist of the action, it is by no means the ground or rule of damages —

It may be supposed that here is an incongruity in the law — But as the aggravating circumstances of distressing consequences are the substantial & real ground for damages, I think there is no incongruity in the law —

3 Wils. 19
Esp. Dig 645
Lawes on Plead-ing 67 268.

The law considers all the circumstances of aggravation insult &c in all cases of battery.

The nature of the injury upon the

P. Parent & Child

the disgrace brought upon the family,— the injury done to the female herself,— the unfairness with which the act was accomplished &c all enter into the ground of damages.

1 T. R. 168.
3 Wils - 19.

This action has been maintained where the daughter was twenty three years of age; she living in the family of the father & continuing the same obedience to him as during infancy.

Nay it is perfectly clear that this action may be maintained for an infant child, tho' she does no actual service whatever, & none is expected from her. There is no reason of proving any actual service — she is of course the servant of the father.

Peake's Rep. 55 - 233

But if the child is an adult, service must be proved, tho' it be ever so small. If she only ties her father's cravat, it is sufficient.

Pea. Rep 241
39
Bul. N.P. 27
1 Root 472.

The measure or amount of damages is in a great degree determined by the character of the daughter. If she can be proved to be a very profligate woman &c. the damages in general will be merely nominal, which demonstrates that the actual loss of service is not the real ground of damages.

So also when the misfortune happens on account of the blamable or indiscreet conduct of the father, he can recover no damages. It will be a bar to his action. He is considered the family author of the disgrace brought upon himself, & therefore can recover nothing.

Parent & Child

Pea. Rep 241

That it is necessary to prove service or retainer for service see

3 Burr. 1878
3 Wils 18
2 T.R. 166—

If then the daughter is under age she is considered as servant of the father, unless she serves another either without wages or for wages to be received by herself- In this the father cannot maintain the action, because there cannot possibly be a loss of service to him. But the action is not lost. The person whom she serves is entitled to it. It is not necessary however, that the daughter should be resident in her father's family, in order to entitle him to bring this action.

This action (per quod &c) lies for the parent & any one standing in loco parentis- Suppose a female apprentice should meet with this misfortune, the master is entitled to an action for loss of service—

2 T.R. 4
Peake's Rep 55.—

An aunt has maintained the action where the child living with her in her family- I think the child had no parent.

Parent & Child
7
Lecture
13—
3 Wils. – 18 –

In actions of per quod &c by the father for the seduction of his daughter, she is herself a competent witness, having no interest in the event of the suit.

I do not know how it happens that in England, the form of the action, brought by the father in this case was almost universally been trespass, & not trespass on the case.

3 Wils – 18 –
3 Burr. 1878
2 T.R. 4.
Peake's Rep. 233
240 –

If my servant is beaten his remedy is by the action of trespass for the battery, but my remedy is for loss of service, an injury consequential upon the battery — the battery is not mine —

1 T.R. 167 –
1 Selw. N.P. 9.13.
6 East. 338 –
2 New Rep. 482

Therefore I think trespass in the former case is an improper form of action.

It is substantially an action on the case —

But when Deft. has illegally entered the house of the Plff, Plff may sue him in trespass for this illegally entering his house & lay the seduction which was consequent upon the illegal entry as matter of aggravation & ground of damages.

This rule I lay down as founded in principle.

I suppose the practice of bringing trespass in the former case arose from the necessity of stating the actual violence committed as a cause of the loss

Parent and Child

the loss of service Tho' this is merely inducement & by no means the gist of the action.

But the established practice in England is to bring trespass in both cases.

2 T.R. 166.

When the plf. however, sues for trespass for illegally entering his house lays the subsequent injury as matter of aggravation only, a permission to enter, if proved, by the defendant defeats the action, tho' it does not justify the subsequent injury—

8 Co. 146 b
Perk. sec. 191—
Yelv. 96—
2 B. Rep. 148.
1 T.R. 12.

When the law gives permission to one to enter the house of another without his consent, it will take care that he shall not abuse that license & if, after such entry he shall commit a wrong or injury, he is a trespasser ab initio.—

But if such permission is given by the owner, & after entry upon that permission he commit an injury he cannot be a trespasser ab initio—

Cro. Eliz. 770
Fitzh. N.B. 90.
2 Co.
3 C. 38 b
3 B.C. 130
3 Burr. 1879

It has been questioned whether for the act of taking away a man's minor child an action will lie by the father, if he lays no loss of service—

But I cannot doubt for a moment that the action will lie—

Parent & Child

He has a right to the custody of the person of his child to educate maintain & protect him — Will the law give him this right and not support him in it? — Every thing indeed, at the present day seems to combine in support of the action —

1 B.C. 453.

The authority of the father ceases when the child attains the age of twenty one years — He is then said to be Emancipated being no longer subject to his personal control —

It is said that the mother as such has no personal authority over her infant children — But this rule I do not think wholly defensible — If the mother is a widow she certainly has such authority, and may exercise personal control over her children if the father is alive, but it is then supposed to be through the permission of him, the father, which is presumed till the contrary appears — Thus the rule amounts to very little, tho' with the qualifications I have annexed to it it appears very reasonable — It amounts finally to this that the Husband's authority is paramount.

How far a Parent is liable for the acts of his minor children —

1. The father is liable for torts

committed

Parent & Child

committed by his minor children in the same extent precisely that a master is liable for the torts of his servant. He is liable not in the character of parent but in that of master —

2. The father is no otherwise liable for the contracts of his minor children, than as masters are liable for the contracts of their servants except in the case of contracts which they make for necessaries.

I will barely remark here that this exception in the case of necessaries is determined by the rule which regulates the duties & rights of Parent & Child.

Stat Con. Tit. master.

There is one further exception to the 2 Rule which is that under the statute of Con. where a minor child is allowed to contract for himself by permission of the parent, the parent himself is liable i.e. bound by his contract.

Stat Con. 228
370. 308 —

3. In certain cases under the Statute law of Con. the parent is obliged to pay fines inflicted on his infant children. Breach of Sabbath — neglect of military duty by infant child, are among those cases mentioned in the statute

Parent & Child — ute. I now come to consider the different kinds of guardians and their Rights & Duties —

And I will here premise that there is not a title in English Books more confused than this. Hargrave in his notes on Co. Litt. is the most clear upon the subject.

1 BC 460 A guardian is a temporary parent, or more strictly speaking, a person standing in loco parentis during the childs minority —

And a child standing under a guardian is called a *ward*. In England the guardian has the charge both of the person and estate of the ward.

1 BC. 469 — But the person of the ward may be subject to one guardian and his estate to another. It is not therefore to be understood that both are of course under the same guardian.

There are different kinds of guardians, as guardians at Common Law — ~~by~~ custom &c —

Of guardians at common law, their kinds are four —

The *first* is guardianship in chivalry — This is of feudal origin. It arose out of tenure. As the feudal tenure was abolished at the restoration in 1666, this kind of guardianship which grew out of it was of course abolished with it.

Parent & Child

1 Inst. 88 note 11. 2 B.C. 67-68. 77

2. Guardianship by nature.— He who exercises this kind of guardianship is called guardian by nature.

The father, mother, or any other ancestor may at the Common law be guardian by nature. The father's claim indeed excludes all others, & that of the mother is second.—

When of more distant ancestors two have an equal claim priority of possession of the person of the child constitutes priority of right.

3 Co. 38 a
1 Inst. 88 b note 12—
6 Co. 22 b
1 B.C. 461.

This kind of guardianship extends to the person only and not to the estate, and continues till the ward attains the age of twenty one years.

1 Inst 88 note 12—

It extends only to the heir apparent of an ancestor & not to the younger children at Common Law.

1 Inst 84 a
88 b note 12
3 Co. 38 b
Carth. 386

It is not to be inferred that the guardian by nature has of course & necessarily not guardianship of estate

Parent & Child 3

estate — They may both be in one person, but the guardianship of estate is by another kind of guardianship —

And if the father is guardian by nature of his eldest child he may be guardian of his younger children, but by virtue of another species of guardianship.

In Con. all the children are heirs apparent & therefore strictly the father is guardian by nature to all.

1 Inst 88.b. note 12 — 89 note 14.

The father, however, may supercede the claims of all other ancestry, & all other kinds of guardianship, by appointing under the English Stat. 12 Car. 2. a testamentary guardian.

But though at common law the father can be guardian by nature only to the heir apparent, yet in England he is styled guardian by nature to all his children. He is not so considered in the sense in which I have explained it at Common Law, but as being the person whom the law of nature designates as proper. So where there is no guardian appointed the Chancellor will settle the guardianship upon the father or at his death upon the mother.

1 Inst 88 note 12

Lecture 14.

3. Guardianship in soccage. —

This kind of guardianship, like that in chivalry, springs from tenure. It

takes

Parent & Child

takes place only when an infant is under the age of fourteen years & is seised of land derived by descent & holden by soccage tenure. — No other person is subject to guardianship in soccage —

1. Inst 87 b
88 note 13.
2 Mod 176
1 B.C. 461 82

The right of guardianship in this case belongs to the nearest of the infants kindred to whom the land cannot possibly descend. The object of this rule is to prevent any temptation to abuse of trust. —

Cro. Jac. 98 —
2 P. Wms 122.
2 Bac 83 —

A guardian in soccage may lease the wards land till the latter attains the age of fourteen years & may maintain ejectment for it in his own name.

1. Inst 87 b
89 note 13
Hutton 17
Vaughan 186.

The right of the guardian in this case extends to the person of the ward, his soccage estate, incorporeal hereditaments &, as it seems, to his personal property. — The reason assigned is, that the custody of the person draws after it every species of property. This is correct only when there is no other guardian having a paramount authority ~~or~~ right.

1 Inst. 90 b
note 1.
88. note 11.
Plow. 293.

The trust of guardianship in this case is not assignable. Now, guardianship in chivalry, when it existed was assignable. The truth is in guardianship in chivalry the object was the benefit of the guardian or lord. But the object of guardianship in soccage is solely the benefit of the ward.

This species of guardianship determines as soon as the ward attains the age of fourteen, & he may then enter and oust the guardian.

Litt sec. 123.
2 Bac. 627.
1 B. C. 461.

The guardian is accountable for the profits of the estate, but is allowed a reasonable reward for his trouble.

1 Inst 89
c. note 13

But this species of guardianship like every other at present, may be superseded by a testamentary guardian.

3 Co. 38 —
1 Inst 84
88. note 12 —
89 n. 13 —
2 Atk 14.

4. Last kind of guardianship at Common Law is called guardianship for nurture. This takes place where there is no other guardian — it extends only to children who are not heirs apparent. The right of the guardian in this case extends to the person only & not to the estate & terminates when the ward attains the age of fourteen years.

No other person can be guardian for nurture but the father or mother.

These are all the different species of guardianship at Common Law.

There is guardianship by statute in England.

The father may appoint a guardian for his child, whether father is of age or not, either by will or deed; & this appointment he may make for all or any of his children who are infants and unmarried. He may also direct that it shall continue till the ward attain full age, or for any less period which he may think proper.—

1 Inst 89 note 15.
1 P. Wms 103.
2 P. Wms 110.
2 Wils. 129.
1 B.C. 462.

This kind of guardianship extends to the person and all the estate of the ward and supersedes every other kind of guardianship.

But this like all other kinds of guardianship except that of chivalry is not assignable.—

2 Atk. 14.

There is also another kind of guardianship known to the Stat. Law of England 4 & 5 P. & M. & regards females till the age of sixteen — There are others probably by custom, none of which can be of any use to us here.—

There are certain kinds of guardianship not enumerated by the common law writers, and not known originally to the common law of England—

Of these the first is guardianship elect by the infant.

This takes place when there is no other guardian appointed either by the father or by law. For if any of those I have mentioned can take place or if any guardian is appointed by the father, guardianship by the election of the infant cannot take place. This

1 Inst 87b
89 note 16.

Parent
Child

This kind of guardianship is comparatively of modern origin. It was first known about the period of the Restoration 1660.

1 Inst. 87.
1 Rep. 375
1 B.L. 519—
note 16.

The ordinary practice is for the infant to make his election before the Judge on the circuit. But it is not regulated in what manner — whether by deed or otherwise. I think however, that any mode which shall be satisfactory to the Judge on the Circuit, will be good.

The age at which an infant may choose a guardian is said in England to be fourteen. But this seems not to have been settled. For infants have chosen guardians both before & after that age. When this species of guardianship first came into use, infants under fourteen most usually made an election.

1 B.C. 463
490.—
1 Inst. 89.
note 16—

There seems to be an absence of a fixed, determinate rule. Therefore I think infant will be allowed to elect his guardian, when he shall be supposed to have attained sufficient discretion —

2. The second kind of guardianship unknown to the common law is that by appointment by the Lord Chancellor.

This is of modern date. It seems

that

of Parent
Child

that the Court of Chancery began to exercise this power somewhat more than a century ago, in the reign of William 3d since which time, its authority has not been questioned.

Gilb. Eq. Rep.
172.
1 Bro. Par. Ca.
544.

The King is guardian paramount of every infant in the Kingdom, and he exercises this guardianship by the great seal through the Chancellor. Now by virtue of this authority, the Chancellor can appoint a guardian in all cases in which he thinks proper— But he never exercises it when the infant is supplied with a proper guardian. This power extends to the removal of a guardian & the appointment of another— He may remove even a testamentary guardian & appoint another.

1 Inst 89.
note 16.
2 Burr. 679
1 P Wms 703
Salk 44
1 B C. 463
Prec. Cha 106
1 Vez. 160

Under the Law of Con. the Court of Chancery has no such power.

3. The third kind of guardianship is that by the appointment of the Ecclesiastical Court.

Whether this court has such power has lately been questioned. It claims in England the right to appoint a guardian to the personal property & person of the ward. But it seems to be the better opinion that it has no such power, except in common with

with

Parent & Child

with all courts, of appointing a guardian ad litem when an infant is sued before it.

1 Lev. 162
1 Bac 679
2 Burr. 1496
3 Atk. 631
1 Inst 131 b
132 a & b

So far as respects guardianship of person, the power of the Eccl. court has always been denied; & as to personal property, it has more lately been denied.

§4. The last species is called guardianship ad litem.

01-89
note 16
135 b
5 Co. 53 b
2 Lev 136
3 B. C. 427

A guardian ad litem is a special guardian appointed for a particular suit, when an infant is deft. & has no general guardian.

A guardian ad litem may be appointed in any court in which the suit is brought.

In England the King may by letters patent appoint a guardian ad litem to appear in all the infant's suits; but now he seldom if ever exercises this power —

I have now gone through with all the different kinds of guardianship known to the law of England, either common or statute.

Under the law of Con. there is no such thing as guardian in chivalry — in soccage — by testament — by appointment of the Chancellor — by custom or by appointment of the Eccl. Court. —

The only guardians known to the law of Con. are

1.

Parent & Child

1. What are called guardians by nature or natural guardians.—
2. Guardians appointed by the Court of Probate +
3. Guardians ad litem —

Guardianship for nurture in the Common Law sense of the term, cannot take place in Con. and I trust in no other state in the Union.

Guardianship for nurture cannot take place with regard to children who can be subject to guardianship by nature. And as guardianship by nature with us extends to all the children, it follows of course that guardianship for nurture is excluded —

Guardianship by nature, then, extends to all the children & to their persons & estate, and continues till they attain the age of twenty one.

The right to exercise this guardianship belongs to the father, After his death the mother at Common Law is entitled to the guardianship.—

In Con. the mother of course exercises a guardianship over the children; but another person may be appointed during her life guar-

Parent & Child guardian to the male children, & this without formally removing him. Her right, then, in Con. is not absolute like that of the father.

She is of strict right natural guardian to all the female children after the death of the father.

Root 320 — The decision of the Court is that the mother is of strict right natural guardian, after the death of the father, of the female children till they arrive at the age of choosing a guardian.

But while the father is alive another guardian cannot be appointed unless the father is removed, and this cannot be done

Stat Con 373 unless for special reasons on which he is to be heard —

He may be removed for incapacity — age — immorality — fraud in the management of the infant's estate &c, or for any cause which, in the opinion of the Court of Probate, renders him an improper person to discharge the trust.

If an infant in Con. has no father, guardian, or master, it is the duty of the Court of Probate to appoint one. —

Parent and Child 3

If the infant has attained the age for choosing his guardian, it is the duty of the Court of Probate to summon him to appear & make his election. Other things being equal, the Court will take the person chosen by the infant, but are not bound by his nomination. —

Under the law of Con. the age of choosing a guardian is fourteen in males and twelve in females. —

Stat Con 373

If the infant neglects or refuses to choose the Court of Probate may appoint a guardian according to its own discretion. They cannot compel him to make a choice.

If a male infant is under the age for choosing his guardian, the Court of Probate need not summon him — But it is not usual to appoint a guardian for children under the age for choosing when they have a mother; tho' it may be done for males as of course.

The Court of Probate here, as that of Chancery in England, may remove the father as guardian.

Parent & Child

Lecture 15

Reeve 252
286. 287—

It has been determined in Con. that if a guardian has been appointed for an infant under the age for choosing, he continues of course guardian of the infant till he comes of full age, unless after coming of the age for choosing the infant shall choose another who shall be approved by the Court of Probate.—

It is required by our law that the Court of Probate who appoints a guardian, take security of the guardian for the faithful discharge of his trust. If the infant has property, another person as surety must be joined in the bond.— If he has no property, the bond of the guardian alone will be sufficient if he is a responsible person.

This bond obliges the guardian to account to the ward or Court of Probate when the ward attains full age or sooner if required by the Court of Probate.

1 Ans. 89
note 9—

And in England as well as in Con. all guardians are bound to account for the ward's property in their hands.

The usual remedy for the ward against the guardian for the recovery of his property or to bring him to account is by a bill in Chancery. This Court has assumed almost exclusive jurisdiction in these cases. Tho' an action at law will lie to account, the former method by Bill is in most general use.

Parent & Child

12 Ves. 188 note 9
2 Bac. 679–687
1 B. 463

But it is not uncommon for the Chancellor to bring the guardian to account before the ward attains full age; as in Conn. the Court of Probate may do if it thinks proper. In Conn. the usual remedy for the ward against his guardian is by an action of account at law. & this action being almost as remedial here as a Bill in Chancery in England.

1 Eq. Ca. Abr. 127. 260
2 Fonb. 177
2 Bac. 679.

If the property of the ward is in danger by reason of the guardian's insufficiency &c he may be compelled to account immediately — at any time. Yet it is not generally done till the ward attains full age, unless the Court get into the practice of bringing the guardian to account annually.

1 P. Wms. 703 to 706
1 B. 463
1 Eq. Ca. Abr. 261
2 Sack. 44
Lo R. 480.
1096
1 Vern. 442
1 Vez. 160.

In England if the guardian is guilty of any misconduct to the ward, the Chancellor may remove him; or if there is any reasonable ground for suspecting such misconduct, they may compel him to give security, and on refusal may remove him.

No

Parent Guardn

e No guardian except the parents of the ward are bound to support him at their own expense.

Any guardian then, who is not a parent of the ward may apply the ward's property for his support – But the parent, tho' guardian is bound to support the ward, if of ability, tho' the ward's property be amply sufficient for that purpose.

But if the parent-guardian is unable to support the ward, he may obtain leave from the Court of Chancery in England, or Court of Probate in Con. to apply the ward's property to his support.

1 Bro. Cha. 387.
1 Vez. 160
17 Ves. 255
3 Atk. 399.

And he will be most secure, always in the first place to get this permission from the Court. If he make such application of the ward's property, he will be safe, if the Court afterwards allow it, but he cannot assure himself of this –

1 Bro. Ch. Ca. 268
1 Vez. 160

But a widow, being guardian to her infant children, having married a second time, is not bound to support her children after taking the second husband, but may apply their estate to their support, tho' she were bound to support them before such marriage.

§

Parent
Tyre
2 Vent. 363.

I doubt the propriety of this rule. The husband has the control of the mother's property, at least during coverture. And why should both parties by the act of marriage be free from the support of those children, while the same property which was previously bound to furnish such support still remains in the hands of the Husband—? I think there is an impropriety in it. But the rule is settled as above.—

How far a parent may apply his minor child's estate for any thing more than necessary or ordinary maintenance & education, opinions are not altogether agreed.

The truth is there seems to be no definite rule on the subject.

2 Vent. 353
2 Vern. 137
2 55. —
3 Atk. 399
Bunbury 136
1 Vez. 160

Sometimes the Court of Chancery will allow the parent to appropriate part of the ward's estate to give him more than an ordinary education &c — It rests, however, so much with the discretion of the Chancellor that it is difficult to lay down any definite rule.—

It is provided by our Stat. Law that when the interest of an infant mortgagee is decreed by the Court of Equity to be reconveyed on bill of Redemption the

Parent
Child

Stat Con.

guardian may make a valid reconveyance, and the Court will compel him to do it.

If the infant has no general guardian, a guardian ad litem will be appointed for the purpose.

Burr. 1794
1 B. Rep. 575

In England the infant himself can do it.

And by Stat. Con. the guardian of infants heirs of joint tenants or tenants in common, is empowered, with the assistance of such other persons as the Court of Probate shall appoint for the purpose, to make equal partition.

In England this may be done again by the infant heirs themselves, upon the principle that if the infant voluntarily does what by law he might have been compelled to do, he shall be bound thereby.

2 Roll 256
2 Bac 684

It's said in some of the books that the guardian or next friend may in such cases make a valid partition — But I doubt this very much — The infant is able to do this himself — The guardian or next friend can do it for him. Here seem to be two inconsistent rights — The guardian is appointed for the purpose of doing for him

Parent & Child

for him what the infant cannot himself do—

A guardian is never allowed to make an advantageous speculation for his own benefit, with the property of the wards. And this rule holds tho' the property of the ward should receive no injury thereby. As if the creditor of the ward receives from the guardian a less sum than is due, in satisfaction of the debt, the ward and not the guardian shall be entitled to the discount. The guardian shall be considered as having procured the discount for wards benefit.—

2 Cha. Ca.
245.
2 Bac 687.
2 Com. Dig.
230—

The guardian is considered in Chancery as trustee to the ward— It is well settled that if a stranger tortiously enters the ward's land & takes the profits, he, the wrong-doer, is compelled in the character of trustee or guardian to account for the profits. Tho' the infant has his election either to proceed against the tortfeasor as a disseisor or to proceed against him in Chancery & make him account as trustee or guardian. The latter

1 Atk. 489
1 Vern. 436
1 Roll. 661
2 Vern. 295
342
1 Eq. Ca. 280

mode

Parent & Child

mode is generally preferable, when the wrong-doer can be compelled on oath to make a discovery of the value of the profits—

And if in this case the wrong-doer should have continued after the infant attained full age, he shall be compelled in Chancery to account for all the profits as trustee or guardian both before and after the full age of the infant.— 2 Bac. 687.

2 Vez. 629. A guardian having the ward's money in his hands, must in accounting allow legal interest for it, unless he can shew that it could not be obtained or not with safety—

1 Cha. Ca. 156
2 Com. 231

And if the guardian has money or personal property of the wards in his hands he is bound to discharge the wards debts with it. He is not allowed in such case to permit the wards debts to draw interest, if he does the money laying still in his hands, he must himself be answerable for it. And it will not be allowed him in such case to pay the ward's debts with his own property, retain the ward's and charge him interest for the

Parent & Child

the money paid.

And if the ward's estate is in mortgage, it is the duty of the guardian to apply the profits of the estate to the payment of the debt — to discharge the incumbrance. 1 P. Wms. 279

The guardian has no authority to vest the ward's money in land. 1 Vern. 435 430. But if he does it taking deed in the ward's name; the ward on coming of full age may at his election either retain the land or claim the money at the hands of the guardian. If, however, he claims the money he is bound to reconvey the land to the guardian; & if he does not do it voluntarily, he will be compelled, by the Court of Chancery, to do it.

If the ward die without making an election, his Executor must take the money. He cannot take the land, the right of election being personal in the ward. 1 Vern. 403 435 2 Com. 231.

The guardian in accounting is, in general obliged to pay over the principal and legal interest. But if, the money was directed to be appropriated in any particular manner, as to be vested in the funds and

Parent & Kid
1 Vez. 629

funds and the guardian notwithstanding appropriates it another way, as in a gainful trade; the infant on coming of age may claim the principal & either the legal interest or the profits of the trade—

As to the marriage of wards of this the Lord Chancellor in England exercises an authority never exercised in the Court of Chancery in the state of Con. & perhaps in none of the States.

Talbot's Ca. 58.
2 P. Wms 111—
562—
1 Vez. 116—

Thus he may forbid the marriage of the ward without the consent of the guardian; and persons solemnizing the marriage are liable to be proceeded against for contempt. And if with consent of the guardian the marriage appears to be to the disparagement of the ward, the Chancellor may still forbid it—

2 P. Wms 112—
3. Atk. 304

And if only an apprehension of the wards marriage to his disparagement with consent of the guardian be entertained by the Chancellor, he may take him from the guardian and secure his person in any manner he thinks proper.

I do not find any instance in which this authority has been exercised when any of the parents has been guardian. Tho' I think the Chancellor must have the same authority even in that case, in which it can be easily

Parent & Child

sity conceived, there may be necessity for its exercise.

According to our usage in Con. wards may be bound to apprenticeship by their guardians. But I know of no principle of law authorizing this when the parent is not guardian. –

The guardianship of a female infant is determined by her marriage. I should presume this rule would be confined to cases where the husband himself is an adult. I presume it is upon the principle of the husband's becoming her guardian, that her guardianship ceases – But if he is a minor he can no more be her guardian the she herself.

A male infant is not emancipated from the power of the guardian over his property — the guardianship does not determine upon his marriage, except that he is no longer a servant. And it seems inconsistent that while he still remains a ward, he should himself be a gardian –

If a ward marries and his wife is an adult, he still remains a ward –

Parent & Child
No 3
Lecture 16.

The only remaining division of this title relates to the settlement of infants.

The rules which respect the acquisition of original settlements by persons in their own right, by Con. Statute are three —

Statute 391.

1. A person not an inhabitant of this or any other of the United States cannot gain a settlement in this State unless he is admitted an inhabitant by a vote of the Town, or by the civil authority & Selectmen, or unless he has held some office — as constable or grand juror, &c.

2d. Rule relates to such as are inhabitants of some neighboring state — The rule regulates that no such person as inhabitant of any other state shall gain a settlement in Con. unless he has one of the qualifications mentioned in the former rule, or is possessed in his own right of real estate in fee in the Town to the value of $ 334.

3. Lastly — No inhabitant of any town in this State can gain a settlement in any other town unless possessed of some one of the qualifications in the two former rules or unless possessed in his own right in fee of real estate to the value of $100 in the Town where his settlement is to be obtained, or unless he has lived in the Town six years & supported himself

Statute 391.

himself during the time and paid all his taxes —

Parent & Child

But there are certain other modes of acquiring settlements common to England & Con. — —

1. Settlement may be acquired by birth. The place where a child is first known to be is prima facie the place of his settlement. That is, till this presumption is rebutted by some other place being shown to be the place of his settlement. —

1 B.C. 362 —
Carth. 433.
Comb. 364.
Salk 485
2 Ld Ray. 567.

Hence the place where an illegitimate child is born is regularly the place of his settlement. For as the place of its birth is prima facie the place of its settlement, & as in general it can have no other settlement, it follows of course that this is the place of its settlement except in particular cases

Salk. 427.
1 B.C. 362
457 —

2. Tho' if the child is legitimate yet if neither the father nor mother have a settlement, the place of its birth is the place of its settlement.

1 B.C. 362/3
Carth. 433
Comb. 364
Ld. R. 567.

The first general rule then, amounts to this, that the presumption of law is that the place of a child's birth is the place of its settlement — If the child is legitimate the presumption may be rebutted; and by Con. law, if the child is illegitimate. In England

Parent & Child

land, however, in certain cases, only when the child is illegitimate, can the presumption be rebutted. —

2. A Settlement may be acquired by Parentage —

§ 1. The settlement of the father or maintaining Parent is the settlement of the child. This mode of acquiring a settlement holds in England generally, as to legitimate children only — For the relation with illegitimate children is not generally recognized —

So the law of Conn. See 1. Swift 169. 1 Root 155.

2 T.R. 116.

Settlement of this kind is called derivative, because it is derived to the child from the parent; contradistinguished from original settlement as by birth. —

1 T.R. 114.
4 T.R. 118 —
3 Esp. Rep. 1.
Stra. 438. 831.
8 T.R. 479.
Burr. Settl. Cases. 49. 64. 270 —

The settlement of legitimate infant children regularly follows that of the maintaining parent —

Suppose that A is now settled in the town or parish of B — he removes to, & acquires a new settlement in another town — his infant children immediately derive from him the same settlement. —

Burr. Set. Ca. 49. 64. 372.

The settlement of legitimate children regularly follows that of the father, after his death, that of the mother. —

This rule, as to derivative settlement acquired from that of mother, has an exception. —

Parentia

If she marries a second time, the settlement of her husband then becomes her settlement. If she thus acquires a new settlement, that of her infant children does not follow hers. The husband is not bound to support them, nor can she be thus bound. The principle, then, of derivative settlement, which is that of family convenience that the children may be nourished & protected &c in the family to which they belong, does not then require that the settlement of children should follow that of the mother. Tho' if the children are under the age of seven years they go with the mother for the purpose of nurture until they attain the age of seven.

Salk. 528.
Ld. R. 395.
3. Salk. 259.
2 Doug. 9. note
6 Mass. 87.

According to the law of Conn. a ward acquires no settlement by going with the guardian. Our law requires that a person acquiring a settlement by commorancy shall have lived in the place six years, & have supported himself, but if an infant ward, he cannot have supported himself within the meaning of the law.

1 Root. 131.

A settlement once acquired can be lost in no other way than by the acquisition of a new one. As often, therefore

1 B. C. 363.
Salk. 528.
Burr. Set. Ca. 370.

Parent & Child

therefore, as one acquires a new settlement he loses his old one and can lose it in no other way — He cannot forfeit it — He cannot lose it by abandonment — The town or Parish cannot deprive him of it.

Under the law of Con. an inhabitant of the state may acquire a settlement by being possessed in his own right fee of real estate to the value of $100. Now he may hold property to this amount in every town in the state, yet he can have but one settlement. If he has a settlement thus acquired, for instance, in the town of A, and has property sufficient according to the statute to entitle him to a settlement in B. not until he removes to B. does he acquire a settlement there, & when he does he loses that in A. Therefore while at A, his settlement in B. is said to be in posse and not in esse. He has power to acquire a settlement in every town in which he has sufficient property according to the statute —

1 E. 364.
Ld. R. 567.
3 T. R. 356.

An infant has power under some circumstances to acquire a settlement by commorancy and as soon as this is acquired this former one is lost.

And whenever an infant gains a settlement, he is ipso facto emancipated. He is no longer the servant of his father.

Parent & Child

After a child is emancipated i.e. free from belonging to his father's family in the character of a servant, he cannot take the benefit of any new settlement acquired by his father or mother.

3 T.R. 355
Stra. 438
831
Burr. Set. Cas.
270. 638
806
8 T.R. 479
1 Wils. 183.

Now the emancipation of a child may be effected in either of four ways—

1. By attaining full age—

1 Wils 183
3 T.R. 356

2. A child under age becomes emancipated by marriage.— The reason of this is, that the child has now contracted new relations and incurred new duties inconsistent with a state of servitude—

Stra 438.
831.
3 T.R. 110.
5 T.R. 583.

3. An infant child may be emancipated by acquiring a settlement of his own.— The acquisition of an original settlement is itself an emancipation. As in the instance of an apprentice acquiring a settlement by commorancy; which may be thus acquired in Eng. tho not in Conn.

3 T.R. 356

So from the moment of the infant's emancipation he becomes capable of acquiring a settlement of his own.

4. An infant may become emancipated by contracting any relation inconsistent with his remaining

Parent & Child

3

remaining in a subordinate station in his father's family —

Bur. Sett. Ca. 63
3 T. R. 116. 356
6 T. R. 247 —
8 T. R. 479 —
5 T. R. 583.

Thus a soldier who enlists into the army, is emancipated. I do not, however, discover upon this relation's ceasing why he should not again be subject to the control of the father —

But tho' the attainment of full age is regularly an emancipation, it is said not to be, if the child continues a member of his father's family.

6 T. R. 252
2 East. 276

This as far as respects deriving a settlement, is correct if the child remain in the same subordinate situation — in the same character as before his attaining full age; tho' he may free himself from the situation at any time he pleases —

Str. 544
Bur. Sett. Ca. 162. 371 —
Salk. 528.
Kirby 262

3. A settlement may be acquired by marriage. —

Thus on marriage the husband's settlement is immediately communicated to the wife, & hers of course is lost. —

Bur. Sett. Ca. 122. 379
Salk. 528
1 B. C. 363

If, then, a woman settled in A. marries a man settled in the town or parish of B. B. becomes the place of her settlement & she ipso facto loses her original settlement. (3)

And it has formerly been decided in England that if the husband has no settlement, that of the wife is suspended during coverture, tho'

tho' it revives on the death of the husband.

This was the law formerly in England & for sometime; but is not at present.

But it seems now established that if a man having no settlement marries a woman with a settlement, and he does not remain within the realm, or if within the Realm does not live with & support her, her settlement continues, & in this case her children by the marriage have the same settlement with her. —

Parent & Child.

Stra. 544. 883
1 Root 232.

Burr. Settle. 370. 372.

Sheriffs and Factors.

By

James Gould Esq.

Sheriffs and Gaolers.

Lecture 1. — Gould

July 13. 1812

First as to the nature of the office & manner of appointment to it.

The word sheriff is derived from shire a county & reeve, a keeper or governor, denoting in its original sense a keeper or governor of the shire or county — 1 B. C. 339. 433

The Sheriff in England is appointed by the King out of the nomination of three persons by the twelve Judges — The Sheriff was formerly appointed by the inhabitants of the county. 1 B. C. 340 341

By the English statutes 4 Edw. 3. & 23. Hen. 6. the Sheriff can hold his office for one year only. But it is said he may be appointed during the pleasure of the king, and in the writ which issues on his 4 Co. 32. 4 Bac. 434 1 B. C. 342.

Sheriffs & Gaolers

his appointment, he is in form appointed during the pleasure of the King.

Huson 383 In Con. the sheriffs of the respective counties are appointed by the governor and council. There is one to each county. He holds his office during the pleasure of the governor & council, so that the office of Sheriff in this state is determined only by death, resignation, or removal.

In England two persons sometimes hold the office of Sheriff in the same county, but in that case they constitute only one sheriff.

4 Bac. 435. It is the duty of the sheriff to reside in the county of which he is keeper. He has regularly no jurisdiction out of such county. But if it is necessary for the completion of an official act regularly begun, that he should go out of the county, in such case he has authority to go out of the county, & his act thus done out of the county will be valid. 4. Bac. 435. As if the Court of the county of Litchfield should order the sheriff of the county of New Haven to bring a prisoner from that county before them, the sheriff of New Haven county in obedience to such orders bring the prisoner before the Court at Litchfield.

Sheriffs & Gaolers.

If a sheriff in pursuance of a precept make an attachment upon property in his own county of A. and it is necessary for him in order to finish the service of the writ to leave a copy at the deft's usual place of abode which is in the county of B. the Sheriff may go out of the county for that purpose & the service so made by him will be good.—

Plow. 37.

And if a prisoner escapes out of one county into another, the Sheriff of the former county may pursue & take him. For the act of caption is nothing more than a furtherance or continuance of his regular authority.—

Hobart 13.
Kirby 240.

A Sheriff may upon the principles of the Common law, appoint a deputy, who as his servant may execute all the ministerial duties of the Sheriff himself.

But by a late statute of Con. a sheriff can never appoint a general deputy without the approbation of the Court of Common Pleas in his county. — Still without such approbation, he may appoint a special deputy — By which is meant one to execute a particular process or number of processes

Speci-

Sheriffs Deputies.

specified in the power. —

Sheriffs of different counties may appoint each other deputies without consent of the Court of Common Pleas. Hence a man may be deputy sheriff for a county in which he does not reside —

The Sheriff has a right to remove a deputy whenever he pleases —

Salk. 95. Hob. 13.

But while the deputy continues in office it is not in the power of the Shff. to abridge his powers as Deputy Sheriff. Because he acquires certain duties & relations & the law will bind him to the exercise of all the duties of his office

Stat. Con. 501.

Under our law also, the Court of Common Pleas, upon complaint made against the deputy, may in certain cases fine, suspend or forever disqualify him to be a deputy —

Salk. 96. Cowp. 65.

In England, the Deputy acts officially only in the name of the Sheriff. A writ in England is not directed to the Deputy but to the Shff. only. The Deputy is there not known as a public officer, but only as representative of the Shff. & hence a return must in all cases be made by the sheriff. Deputy can only make the shower for the Shff.

In Con. on the other hand, the Deputy Shff is a known public officer & treated as such. A writ is directed as well to him as to the sheriff. He does business in his own name & not in that of the Shff. His official acts are subscribed by him as deputy sheriff —

Sheriffs & Gaolers

Stat Con. 24 212 —

A writ directed to the Shff. only may here as in England be executed by his Deputy. —

The Deputy here makes the return in his own name, & it has been held that such return is good, where the writ was directed to Shff. only. Kirby 237.

Any covenant or agreement by the Deputy with the High Shff. not to execute any particular or power which properly belongs to him the Deputy, is void as against law. As if deputy should agree not to execute any particular process or those of a particular kind, the agreement is void. — Hob. 114.

A Deputy Shff. cannot delegate his authority.

A ministerial power in the hand of him originally possessing it, or to whom it is originally given, may in general be executed by Deputy. Bac. 4 B. 462

But the person to whom such au-

thority

Sheriffs & Gaolers

authority is delegated cannot him-self delegate it again to another.

If the Shff. directs a warrant to two persons either of them alone may make the arrest.

Stra 117. 1 Inst. 181. 4 Bac. 403. note. — 442

When a private authority is conferred upon two or more, it is joint, & must be executed by all together. But when a public ministerial authority is conferred on two or more, it is several as well as joint. —

If a Deputy is guilty of any breach of duty, the Shf. may have an action on the case against him. For as Shf. himself is liable, it follows that he must have a remedy upon him who occasioned the liability —

1 Roll 98 —

When a Sheriff gives his authority to a deputy, he, the deputy, implies an engagement faithfully to discharge the duties incumbent on him in consequence, that the Shf himself may not be injured thereby. It is, as it were a bailment.

4 Co. 34. 9 Co. 119 — Stat. Con. 222

— A gaoler is also the servant of the Shff. appointed & removable by him;" as the Shf. is, ex officio, Keeper of the Prison of his County.

Hob. 202 Latch 16 — 1 Sid. 318 —

The Sheriff is Keeper of the prison & as such has the custody of the prisoners. He has regularly no right to confine his prisoners in any

Sheriffs & Gaolers

any other place than the common gaol — the place of imprisonment appointed by law —

I speak of this generally. If the prison should be burnt, and the prisoners were running at large, he might then, to be sure take & keep them for a time as he could most properly — — .

"The Sheriff, being ex officio keeper of the gaol, cannot himself be imprisoned in it. There is an absurdity in committing to prison an officer who has the control of the prison. And there is generally no other gaol in the county, it follows that he cannot be committed to prison in a civil case." In a criminal case, I conclude he is imprisoned in a prison in another county. This is done ex necessitate rei.

It has been determined in Con. that if a shf. is arrested in a civil suit, the suit shall abate. Kirby 48.

I doubt the principle wholly — Tho' he should be discharged from arrest, yet, I see no reason why the suit should abate.

If a Peer of the realm in England is arrested in such case, he may be discharged

Sheriffs Jailers

discharged, but the suit may as well go on as if he were not privileged from arrest— There are many cases to this import—

Liability of the Sheriff for the acts & faults of his Deputies—

9 Co. 98— 5 Co. 89— 2 Lev. 158. 1 Vent. 314 2 Mod. 119. The Deputy being servant of the Sheriff, the Sheriff is liable in many instances for the acts & faults of his deputy—

Stats 18. And this, I would observe is the foundation of the Sheriff's right to take security from the Deputy for faithful discharge of his duty; If any other person should take a bond from the deputy for faithful discharge of his duty— it would be nugatory & void. But the Shff. is immediately interested in that for which Security is given—

As to the extent of the Shff's liability on the deputy's account, the rule is, that the official acts of the Deputy are to all civil purposes the acts of the Shff, and the Shff. is liable for all such acts or omissions to third persons who are injured thereby.

The Shff. is liable civiliter but not criminaliter for Deputy's breach of duty.

2 Ld. R. 1574 To subject any person for a crim

upon

Sheriffs & Gaolers

upon the principle of the common law, he must actually himself have been guilty of the act. —
2 Vent. 238. Cro. Jas. 330. Doug. 42. 2 T.R. 154.

But for private torts or wrongs which a Deputy may commit not in the Execution of his official duty, the Shff. is not liable. He is considered as a stranger to these wrongs & having no more to do with them than another person. —

1 Roll. 94.
(Cro. Eliz. 75.)
1 Leonard 146.

It has been questioned, whether if a Deputy seized the goods of A. on an Execution against B. the sheriff is liable to A.

It has been said that the Shff. is not liable because the Deputy does not act according to the direction of the Shff. But it is settled that the Shff. is liable. Tho' the Shff. does not command his deputy to arrest the wrong person &c, yet he vests a person with authority who exercises it unskilfully, and the Shff. shall suffer in consequence rather than a third person. —

4 Burr. 442
3 Wils. 309
2 B.R. 832
Doug. 42

For a mere neglect of duty by the Deputy, the Shff. & he only is liable at Common Law to the party injured by that neglect or omission. The Deputy is not liable to such party.

Sheriffs & Gaolers &c. party – as if a deputy omit to execute a process which by law he is bound to do, the plaintiff in that process cannot maintain an action against the deputy for the neglect, but must have his remedy against the Shff. The reason is because the deputy is not known as a public officer. There is nothing upon the face of the writ which proves that the Deputy has omitted to do what he was bound to perform by law.

5 Co. 89. Cowp. 403 406 Salk. 18. 1 Rou 94 2 Bac. 243 Esp. Dig 603

This rule, by the way is not laid distinctively in the books.

For an actual tort committed by the Deputy in the exercise of his office, he is liable as well as the Sheriff. Shf. is liable because the wrong is committed by the Deputy as his servant. The Deputy is liable as tortfeasor. The party injured, may therefore consider him as such, and like any wrong-doer he is liable. His having a precept which does not warrant such tortious act is no more defence for him, than if he had no precept.

Salk. 18. 1 Leon. 146. Cro. Eliz. 175. 743 3 Mod. 321 2 Lev. 258.

Hence if a Deputy is guilty of

a colour–

a voluntary Escape, he is liable as well as the Shff., but, if the Escape is through the neglect of the deputy, he is not thus liable.

If a Deputy in levying an execution embezzles the money, the party injured may consider him as a private individual & therefore maintain an action against him if he chooses — or against the Shff.

For the acts or defaults of a special deputy appointed at the Plff's request, the Sheriff is not liable.— 4 T.R. 120. Esp. Dig 607.

In Con. the Deputy Shff. is liable as well for neglect of duty as for positive torts committed in the execution of his office.

This diversity between the common law & our own is, that the deputy Shf. is here a public officer — process is directed to him — he acts in his own name, & it follows that he may be sued as a Deputy. — In England he can never be sued as a deputy — It is only for positive torts or wrongs done by him in the execution of his office, that he can be sued —

Sheriffs & Gaolers) If after the death of the Sheriff & before
any successor appointed, any prisoners
(Lecture 2.) escape from the Gaol, no person is liable
for their escape. — The Gaoler cannot
3 Co. 72. be liable, because by the death of the
Cro. Eliz. 366. Shff. the power of the Gaoler which is
delegated to him by the Shff. is determined. —

And in this case there is no other
1. Mod. 14. remedy than that of recaption. The
Pltff. or party interested may retake
the Prisoner or procure it done by proper authority. —

If a Shff. having begun the ex-
Salk. 323. ecution of a Process, as by seizing
Cro. Jas. 73. property under it, is removed before
1 Roll 893, 4. the execution is complete, he may
proceed to finish the execution
after his removal. —
The same rule holds with regard
to a Constable in Con. —

I proceed now to consider with
more particularity the authority
& duty of Sheriffs & Gaolers &c.

1. B.C. 343. In England the Shff. is a judicial as well as an executive & ministerial officer. Hence the Shff. holds courts for many purposes. —
In Con. the Shff. has no judicial authority whatever. He is, however, both an executive & ministerial officer. These, I trust, are the only
offices

offices of a shf. in any of the U. S.   Sheriffs & Jailers.

" I shall consider him only as a ministerial officer and as Consummator of the peace; in which latter character he is an executive officer.

An executive officer is one who executes the law without any command of a superior— a ministerial officer is one who acts in pursuance of the command of a superior officer.

Our Secretaries of State &c are executive officers in the ordinary details of their office.

The Shf. as Keeper or consummator of the peace is the first executive officer in the county; and all persons are in general subject to his commands for the purpose of keeping the peace.—   1 B.C. 343.

Upon principles of the common law, he may ex officio, without warrant commit to prison all persons who breaks the peace &c — It is his duty to commit to custody all traitors & Here he acts as an executive officer.

" The power of the county subject to the shff. on these occasions, consists of all male persons above the age of fifteen years not peers of the realm.   1 B.C. 343. 1 Inst. 168.

By a

Sheriffs Powers

By a statute of Con. the shff. is to suppress riots, routs &c, to apprehend all persons who break the peace without warrant & bring them before a magistrate — & and to command the assistance of all suitable persons —

I presume the words of this statute would receive such a construction as to agree with the Common Law, as respects who are "suitable persons" & extend it to all males over the age of 15 years —

Stat. Con. 384

By our statute also the same authority is given to Constables in their respective towns —

1 B. C. 344.
Plow. 74.
Dyer 60.
Stat. Con. 385.

The more usual & most important practical duties of shff. are in his ministerial character. — The shff. is bound to execute all legal process regularly directed to him, and for neglect is subject to fine & imprisonment, and to a civil action by the party injured.

In one particular here, there is a diversity between the English law & our Com. own.

Doug. 446 —
1 Bac. 58.
206 —
3. B. 291 —
Esp. Dig. 216.
Stat. Con. 601.

In England the shff. is never liable ~~to~~ a civil action for not returning regularly a writ. In Con. an action lies against him for it —

By our law the shff is also bound

to

Sheriffs & Gaolers

if required, to give a written receipt of every writ delivered to him. Stat Con. 385

A known officer, as shf. general Deputy, or Constable, is not bound to shew his writ before he makes his arrest or seises property under it. But after the arrest is made or property is taken, he is then bound to produce his writ if requested.

On the other hand a special deputy or bailiff must, if requested, shew his writ before arrest made or property seised under it. Should he refuse to shew it the party may resist him as he would any person, until he produce evidence of his authority.

9 Co. 69
Cro. Jac. 485.
Esp. Dig. 604.
8 T.R. 187

And the Shff. or his deputy may command the power of the county, when resistance is made to either of them in the execution of lawful process.

1 Inst. 193
453
4 Bac. 453.

And by the statute of Con. in case of great opposition actually made or suspected, to the execution of a lawful process, the shf. with the advice of an assistant or justice of the peace, may command the service of the militia for the purpose, and the militia officers are bound to obey him. The Shf. cannot return that he is unable to make service because having all this power put into

Stat Con.
384

Sheriffs & Gaolers

into his hands, he cannot be effectually resisted. —

(Constables have the same power within their respective towns —)

A sheriff may not break an outer door or window in the execution of a civil process —

5 Co. 91 — Cowp. 1 — Cro Eliz. 909 Hob. 62 Esp Dig. 604 Kirby 38 B.

This is plainly a relict of feudal barbarity — I confess that it seems a glaring impropriety that a man should defend himself from civil process by merely latching his door & shutting his windows. I cannot see upon what principle of law, he should thus be better defended in such case, than he would be by going into his cornfield —

It is said however, in some of the old books, that tho' the breaking the outward doors & windows in the execution of a civil process, is trespass in a shff, yet that the service of the process is good — This, however, is not law — the service of the process is not good —

5 Co. 92. b 2 Bac 367. Cowp 1. 2 B.R. 823.

The modern practice is to discharge the person thus arrested in a summary way. The Court however, may leave him to his plea & to his action for false imprisonment — But the power of the Court summarily to discharge

the person

Sheriffs Powers

the person thus arrested proves the execution of the process to be void. — otherwise they could have no such power —

I do not discover in the books what is meant by the term "breaking" — It would seem to consist in some demolition &c — But as I understand, should a sheriff even lift a latch it would be breaking within the rule —

To unloose or remove a fastening, I conceive a breaking within the rule —

The privilege is now construed to extend only to outer door & windows. If then the officer can enter peaceably or without breaking, he may break all inner doors, trunks &c for the purpose of executing the process — But he cannot do this wantonly & unnecessarily — He must first have demanded that they be opened —

Cowp. 627 — Hob. 62. 263 — Comb. 17. 327 — Esp. Dig 604.

Further — The privilege of the mansion house extends only to the person family and goods of the owner, not to the family goods or persons of another who may be within.

5 Co. 93. b. 1 Sid. 186.

In case of a criminal process, the privilege is not allowed at all. The officer, if necessary for the purpose of executing criminal process, may break outer doors, windows

5 Co. 91. —

Sheriffs & Gaolers

12. Co. 131
4 Bac. 455.

doors &c. The rule is the same for process to compel one to find securities for the peace or good behavior — or processes for forcible entry —

And when a person, known to have committed a felony, is pursued with or without warrant by an officer or even by a private person, his house is no protection to him.

2 Hawk. 139
4 Bac. 455.

If, however, a person thus pursued & taken prove not actually guilty of felony, the officer or person arresting him without warrant will be liable.

I should suppose in such case the justification of breaking a man's doors without warrant, must depend upon his guilt.

4 Bac. 455.
1 Li rot 66.

So also an outer door may be broken for the purpose of suppressing an affray or preventing a breach of the peace. And if those who have broken the peace retreat into a house after the affray is over, shff. may enter the house & take them.

5 Co. 91. b

So also upon a writ of *habere facias possessionem*, to deliver possession of a house, the officer may break outer doors &c. if entrance be denied him. This is a civil process, yet it is for the purpose of giving the officer entrance & possession & if this may be prevented by shutting doors & windows, the process could never be executed. Sheriffs & Jailers

And the outer door of an out-house not joining the House may be broken for execution of civil process, if necessary. — Indeed I believe myself that a store actually adjoining a house, may be broken on such an occasion. I know of no case contradicting or confirming this — Yet the rule is construed strictly — is extended as little as possible — (the rule as to outer doors being a defence &c) ——— 1 Sid 186. 1 Keble 698 — 5 Bac. 182.

If in attempting to execute civil process, the shff's bailiff or follower, having entered the house lawfully is locked in, he may break in to rescue him —) Cro. Jas. 555.) Palm. 52.

And if a person having been arrested, escape into his own house, shf. may break into the house & retake him — Palm 54 6 Mod. 173.

But if a person illegally arrested by breaking of an outer door is charged while in custody with another process, the last execution is good, provided there is no collusion between the officers — If there was collusion between 2 B.R. 823 Esp. Dig. 605.)

Sheriffs Parties

between the officers, the service or execution of the latter process is not good.

At Common Law, process might legally have been executed on Sunday; but by the English statute 29 Car. 2. and a stat of Con. no civil

Salk 78.
4 Bac. 456.
656 —

process can be served on Sunday. — the Execution of a precept on that day is void. The officer is liable for false imprisonment.

But in the case of an escape the rule is different. If a prisoner escapes he may be retaken on Sunday. — By the same rule that a shf. may prevent his prisoner from breaking prison on Sunday, he may pursue him after he has escaped.

Salk 626.
6 Mod. 95.
5 T.R. 25.
Ld R. 1028.

If a man is arrested on civil process on Sunday, he will be discharged from arrest in a summary way by the Court.

6 Mod 95
5 D° 95

Lecture 3.

Law of Escapes.

An escape, is when a person under lawful arrest & restrained of his liberty, either violently or secretly evades such restraint & goes at large before he is discharged by due course of law.

It is essential that there be a legal arrest. For evasion of an illegal arrest is in judgment of law no escape.

Esp. Dig. 607.
608. 609 —
Burn's Notes
259 —
2 Bac. 233
Cowp. 652

An

Sheriffs Papers

For an escape supposes a wrongful act, & it is not wrongful to escape from an illegal arrest.—

It becomes necessary to consider with more particularity than I have done heretofore, what arrests are lawful and what unlawful.—

Every arrest to be lawful must have been made in pursuance of lawful authority, otherwise the arrest is void.—

Tho' it is necessary that the authority should be lawful, yet an arrest may be made without the authority of a warrant or writ of any kind.— 4 Bac. 455.

It is a rule of common law that, when an arrest is made by virtue of a writ or warrant if the Court from whose authority the writ issued has jurisdiction of the subject matter of the writ, it is lawful. It is understood, however, that there is nothing exceptionable in the manner of making the arrest. Therefore there can be an escape in such case —

2 Wils. 384.
8. Co. 141. b
5 Co. 64 —
Stra. 509.
Esp. Dig. 333.
391. 659 —

And it makes no difference if the process be erroneous provided it is not void.— An erroneous process is good till set aside by the Court. But a void process is null ab initio — it never confers any authority upon the officer

Sheriffs of Jailers

fair—

On the other hand, if the Court from whose authority the writ issued has no jurisdiction of the subject matter thereof, the process is void — the arrest made under it is void & of course there can be no escape—

Esp. Dig 608 609—

But tho' it is a general rule that if the Court from whose authority the process issued has no jurisdiction of the subject matter the process is void, yet the Court having such jurisdiction, the process may be void on the ground of irregularity.— Thus when mesne process is issued not returnable to the next succeeding court, when there is sufficient, for service to be made on it for such court, the process is void.— For if the party may pass over one term, he may pass over two or more to any distance of time. Suppose then the writ is made returnable ten years hence, if it were only erroneous & voidable the defendant must remain in prison during that whole time or be at the trouble of procuring bail for that time, which is very uncertain, and finally there may be no real cause of action. But the process is strictly void — the arrest is void — & it follows there can be no escape. The shf. arresting under such

3 Wils 341.
1 Root, 315.
Esp. Dig 328
329. 608. 609.

such process not only may, but must for his own security discharge the person arrested, and cannot in such case be liable for an escape.

Sheriffs Papers

But the general rule which I have given with regard to the lawfulness of process will not in all cases apply to the State of Connecticut. In Con. mesne process is not only frequently but usually issued by a Justice & returnable before a Court which he cannot hold.

The rule in Con. then on this point is this, if the mesne process is issued by competent authority and is returnable before a Court having jurisdiction of the subject matter, it is lawful the arrest made under it is lawful & of course there can be an escape. — But if the process is not issued by competent authority or if issued by competent authority is returnable before a Court not having jurisdiction of the subject matter thereof, the process is void — the arrest made under it is also void & of course there can be no escape.

The principle of this rule is the same with that of the common law, but the terms of the common law cannot apply in Con.

These

Sheriffs & Gaolers.

These are the general distinctions valid, erroneous, & void processes.

1B&P.24. At Common law, an officer having made an arrest on final process, cannot delegate his authority to another person to keep the prisoner during his (shf's) absence. If he does so & leaves the prisoner, the shf is guilty of an escape.

As to this rule, I believe the constant practice of Con. is contrary to it.

The first rule as to the validity of an arrest is that it be made by lawful authority — the arrest must also be actually made or it is no arrest. An arrest can never be made by mere words, there must be an actual touching of the body of the person arrested, or what is tantamount in law, a power of immediately arresting him, and a submission to that power by him, (the party arrested). If the shf says to the party to be arrested, 'you are my prisoner,' and he submits to this authority & follows the shf, this an arrest and if the party so arrested afterwards go at large, it is an escape.

4 Bac. 236.
Esp. Dig. 609
Salk. 79—
586—
Bul. NP. 62.

If a person is arrested at the suit of A. & while in custody, a writ is delivered to the officer who made the arrest, in B's favour, the deft. is ipso facto, as matter of course, at that time arrested on B's writ— Because the deft. being already under arrest, the law will not require the shf. to go through the formality of making the arrest a second time. Therefore if the party arrested goes at large, the Shf. is guilty of two escapes.

[illegible] 318

5 Co. 84. Salk. 237.

I doubt very much whether this is a rule of law in Con. The form of our process is against the body, real or personal property. The English rule contemplates a capias, when the officer is bound to arrest the body of the Deft.—

But suppose in Con. A issues a writ against John Stiles & directs the officer to arrest him, which he does accordingly, and while he has him in custody B. delivers him a writ against the same party arrested— the officer is not to take the body of the deft. according to the process unless there is an insufficiency of personal property &c — Therefore it would seem that the party so arrested on the first process is not arrested on the second by the mere delivery of it to the officer— The

Sheriff's Powers

The arrest must be regular — It must be made in such a manner as the law permits, or in general there can be no escape.

Esp. Dig. 604.
Cowp. 64.

In all civil processes, I would observe, arrest must be made by virtue of a legal writ or warrant, if not there can be no escape.

The arrest must be made by the authority of the officer to whom the writ or warrant is directed, or the arrest is not lawful. When the writ duly authenticated is directed to the Shff. however, he may execute it by deputy, in which case it is considered as done by himself. — And if the person to whom the writ is directed have followers, the arrest made by his followers to be good must be made in his presence in his company. I am not here speaking of Deputies, for they may arrest in the absence of the Shff. A follower may arrest in the the presence or company of the officer by whom he is employed, & the arrest is good — Yet the Shf. need not be in sight nor actually present. It is sufficient if he is engaged in pursuit of the same object with his followers.

Cowp. 65 —
6 Mod. 211 —
Esp. Dig. 604.

6 Mod 95 —
Salk. 78.

An arrest on Sunday, being prohibited by Statutes in Con. & in England, is void. Of course if after such arrest, the party arrested is permitted to allege it is no escape. And in case of an arrest by breaking outer Doors &c, the arrest being unlawful there can be no escape.

If an officer having opportunity to arrest a defendant (the process he has for the purpose), neglects or refuses to arrest him, and the deft. finally evades arrest, the Shf. is liable to the plf. He is not, however, liable for an escape.

Sheriffs & Gaolers

2 Mod. 21
1 Ld R. 331.
10 Mod. 251.
255.

Law as to Escapes themselves —

There are two kinds of escapes only known to the law — voluntary and negligent.

3 B. 415.
2 Co. 52.

I would here premise that every person committed to prison is to be kept in safe & close custody. If the person, then, is after commitment, permitted to leave the prison for one moment, the Shf. is guilty of an escape.

Plow. 36.
3 Co. 44.
1 Roll 806.

A voluntary escape is one which takes place with the consent of the Shf. or gaolkeeper.

3 B. 415.

A negligent escape is one that happens without the consent of Shf. or Gaol Keeper.

As to voluntary escapes

If a Shf. or gaolkeeper admits to bail a person not bailable, it is

a vol.

Sheriffs Jailers

a voluntary escape. So also if a shff consents to a prisoner's going barely out of the limits of the prison even for a moment & tho' he is at the same time under a keeper, it is a voluntary escape. And this is necessary because upon the same principle that shff might excuse himself in consenting thus far, he might in permitting the prisoner under a keeper to go a few miles for a number of hours or a day &c.

1 Roll 806.
3 Co. 44.
Plow. 36.

The rule is the same when a person arrested on final process and not actually committed to prison is permitted by the officer to go at large, for any period of time however short.

2 T. R. 76.
1 B & P. 26.

Prisoners committed on criminal process are in Con. as I presume they are in England, confined within the walls of the prison. Those committed on civil process, may by procuring security to save the shff harmless be allowed the limits of the prison yard.

1 Sid. 13.
Bul. N.P. 72.
1 Root 72
Kirby 137.

It has been once determined in England that if a prisoner committed on execution is brought up to Westminster Hall upon a writ of Habeas corpus ad testificandum & the shff executing the Habeas is guilty of a voluntary escape. Sheriffs Gaolers

This is outrageous & never was law — This decision is denied —

But if an officer who brings out a prisoner upon a writ of Habeas corpus, grants him any unnecessary and unreasonable liberty in going abroad, he is guilty of a voluntary escape — Thus when in England an officer upon a Habeas corpus to bring a prisoner from one County into another carried the prisoner out of the way about sixty miles for the purpose of giving him an 'airing,' he was held to be guilty of a voluntary escape —

The rule then, is that when a prisoner is brought out on Habeas corpus, he must be brought to the Court to which the writ is returnable in a reasonable, convenient time & by the most convenient way. 3 Keble 305 — Ld R. 241. 399. 788 6 Mod 78. Cro. Car. 14.

The law also requires that an officer having made an arrest on final process must commit the party arrested in convenient time, and if he does not he is guilty of a voluntary escape — 1 B & P 24 2 T.R. 176.

If a sheriff marries a woman committed to prison Plow. 17 —

Sheriffs Gaolers

to prison she is ipso facto discharged and he is guilty of a voluntary escape —

The principle is that no man can be the gaoler of his own wife —

Esp. Dig 606. And if the Shf. appoints one of his prisoners a Turnkey to his gaol, he is guilty of a voluntary escape, and this tho' the prisoner should not actually leave the prison. Because he cannot under these circumstances be in the custody of the Shf.

2 T.R. 131 — 1 Root 106 127 — In general, if a prisoner having the liberty of the prison yard, goes over the limits without the knowledge of the Shf. the escape is a negligent one in the Shf. But if a prisoner having the privilege of the limits of the yard has manifested a disposition to escape, it is the duty of the Shf. to commit him within the walls of the prison, if he does not & the prisoner escapes the Shf. is guilty of a voluntary escape and Mr Gould says the bail are not liable. —

2 T.R. 131 — A Shf. is not bound to grant the liberty of the yard even upon a bond of indemnity offered to him. The prisoner cannot demand it —

it stricti juris. The Shf. has a right to do it, if he pleases & generally does but he is not bound to do it.

But as he is allowed to give to prisoners the liberty of the yard he may take a bond to secure himself and a bond so taken is good.

Sheriffs & Gaolers

2. [illegible]

Negligent escapes are such as happen without the consent of the officer. This may be either the Shf, constable or any other officer who has the prisoner in custody.

3 B. C. 415.
Cro. Jac. 419
Fitzh. Nat. Brev. 130 –

Thus if the prisoner escapes by fleeing from the officer, by violence, by breaking prison or by any other means to which the Shf. or gaoler is not consenting, the escape is a negligent one – In case of a rescue, then, the escape is always a negligent one.

The difference between escapes on mesne & those on final process.

2. B. R. 1049
2 T. R. 1?2
5 T. R. 487
Salk. 108.
2 Wils 295.
Stat Con. 39.
Kirby 209.
382. 484.

I have observed heretofore that if a person arrested on final process is permitted to go at large for a moment the officer is liable for an escape &c.

But a person arrested on mesne process and not committed to prison, may be permitted to go at large without subjecting the officer to an escape, if he is forthcoming at the time of the return of the writ. In Con. the officer, in such case is not liable for an escape

Sheriffs & Gaolers

Cro. Eliz. 623, 652. 868 — Esp. Dig. 609.

escape, if the deft. is forthcoming in the life of the execution which is issued on the judgment against him.

But if the party thus arrested on mesne process is not forthcoming according to the exigency of the rule, the officer is liable for an escape —

You will perceive, then, there is a material distinction between arrests on mesne & final process. The reason of the difference I take to be this — an arrest on final process is intended as the coercive means of payment. If, then, the officer may permit his prisoner so arrested to escape for one moment he may for an hour, a day, a year or for any length of time upon the same principle, and thus there would be no particular time for his return to the prison & the object of the final process would thus be defeated.

But the object of the deft's arrest on mesne process, is that his appearance may be had in Court to respond the judgment which may be recovered against him in that suit. If this object is answered, therefore, it is sufficient.

2 Wils 294. Salk 271.

If a person, arrested on mesne process, is committed to prison, and he is afterwards permitted to go at large even for a moment it is a voluntary escape. When a person is committed to prison, the order of the shf. is to keep him in safe and close custody. If then, he permits him to go at large he violates this order. But the consequence of permitting the prisoner to go at large is the same in this case as in that of an arrest on final proceſs, tho' the reason of the rule is not the same.

Sheriffs
Gaolers

Esp. Dig. 610.
1 Roll. 807 —
Stat Con 222.

But the order of the shf. in making an arrest on mesne proceſs is to have the person arrested forthcoming at the return of the writ and provided he is so forthcoming there is no violation of the order.

And after the prisoner is permitted to leave the prison, his return to the prison does not bar the plf's action against the officer for an escape, nor does the prosecution of the suit against the deft. by the plf. operate a waiver of his right of action against the shf. or gaoler.

2 Wils. 294.
Salk. 271.

There is also a difference between the remedy to which the plf. in the proceſs is entitled against the shf. in an escape upon mesne proceſs & one upon final proceſs —

If one arrested on mesne proceſs escapes, the plf's only remedy against the shf. is an action of trespass

2 T.R. 129.
4 T.R. 611.
2 Wils. 295
Cro. Eliz. 17
2 Stra. 873.

Sheriffs & Gaolers

trespass on the case. Here the action cannot be supported unless the plf. proves a legal claim against the party arrested. This an action for the recovery of special damages, but if the plf. has no legal claim against the party escaping, he can have no right of action against the shf.

1 Esp. Rep. 169. Pea. Rep. 65. Here I will barely observe that the acknowledgement out of ct. of the party escaping of being indebted to the plf. is good evidence against the shf.

2 T.R. 129. 132. 2 H.B. 110. 2 B.R. 1048. Stra. 153. For an escape on final process the plf. may also have an action of trespass on the case, and by stat. West. 2. 1 Rich. 2. he may have an action of debt against the shf.

This rule holds upon escapes upon final process whether before or after commitment to prison.

Esp. Dig. 609. 2 Wils. 295. 2 T.R. 129. In an action of trespass on the case whether for an escape on mesne or final process, the jury are at liberty to give what damages they think proper. If the jury give special damages only and not the whole claim, the plf. may proceed & recover his debt of the original debtor. But if the plf.

For an escape on final process bring debt against the Shff, the jury are bound by law to give him the whole sum for which the party escaping was charged in execution. — Sheriffs & Gaolers

This rule is formed upon the ground of the liability of the Shff in this action, as the statute transfers the whole debt to the Shff. — 2 B. Rep. 1048 / 2 T.R. 126 / Esp. Dig. 609.

Our Statute law however, seems to have furnished a new rule of damages —

For as I understand it, in case of a voluntary escape, whatever may be the form of action the Plt, shall recover the whole debt in damages. — As to negligent escapes, it leaves it where the common law has fixed it. — Stat. p. 366. sec. 16 —

If a person is arrested on mesne process and before commitment is rescued, the officer is excusable. But if the arrest be upon final process and a rescue is made the officer is guilty of a negligent escape. — The only reason assigned for the distinction is that in the latter case the officer should have sufficient power with him but this does not seem to be a satisfactory one. — 3 B. 416. / Cro Eliz. 873. / Cro Jac 419.

But

Sheriffs & Gaolers

But after a person arrested on mesne process is committed to prison, a rescue is no excuse for the shf. unless it is made by the public enemies - no power but that of the public enemies is supposed to be equal to that of the shf. and however the fact may be the presumption cannot be rebutted.

1 Roll 808.
1 Co. 84 a
Cro 482 -

A public prison is a place about which it is in the power of the shf. to have sufficient force, and a vigilant shf. will almost always prevent any intention to destroy the prison or rescue the prisoners.)

The rule is the same when one is arrested on final process tho' not actually committed - a rescue is no excuse.

In case of an escape effected by rescue, when the officer is liable the plf. in the process may maintain either against the shf. or rescuers - But by bringing his action against the shf. he is said to waive his action against the shf. This rule appears to be a reasonable one - For if plf. after having commenced his action against the rescuers, should be at liberty to requite them & resort to the shf. he might

Esp. Dig 657.
659. & 710 -
6 Mod 211 -
Cro. Car. 77 -
or 109 -
Hatton 98.

Sheriffs
Gaolers

he (sh.) might, at such time have lost his opportunity of remedy against the rescuers &c —

When an action is brought by plt against the rescuers, on principle I think it should be trespass on the case — For the rule see —

Cro Jas 486.
Hob. 180.

In an action by the Plf. in the process against the rescuers, the jury may give damages as they please, and if they give only special damages he can then proceed & recover his debt against the original debtor. But tho' the jury are always at liberty to give less damages than the original claim, still it is seldom if ever done.

6 Mod 211.
Esp. Dig 657 — 659 —

In an action against an officer for an escape on mesne process, his return on the writ is conclusive evidence against the Plf. that the person arrested was taken from him by force & the Plf. cannot traverse it. But if the officer has made a false return he may sue in another action for the false return.

Cro. Eliz. 781.
Comb. 298.
1 Vent. 224.
2 Vent 175.

I will here suggest that it has been said that this rule of the Common Law is absurd. But

the

Sheriffs
Gaolers
&

But, the reason why the return of the officer in action against him for an escape is good is that the plff. does not complain of a false return, and as that is not the ground of the action, the return is not to be denied & the officer is not to experience the consequence of a denial unless it is put in issue by pleading or by declaring upon it & giving him due notice. The officer is not supposed to carry his witnesses with him—

Cro. Jac. 77 & 109—
Hob. 180.
Hutton 98.

The shff. can maintain an action of trespass on the case against the rescuers. Think it must be confined to those cases where shff. himself is liable to the plff. and of course only where the process was final.

Stra. 482
Esp. Dig. 610

Rescue is no defence to the shff. when he is bringing out a prisoner on habeas corpus.

4 Co. 84—
1 Roll. 808.
4. T.R. 789.
2 H.Bl. 718.

When a person is arrested even on mesne process & committed to prison nothing but the act of God or the public enemies can excuse the officer in case of escape. — Thus it has been determined that if the prison is burnt

except

Sheriffs &c. Gaolers

excapt, by lightning & the prisoner escape, it does not excuse the Shf.

In the case of Lord Geo. Gordon's riot when 20,000 were assembled & demolished almost all the gaols in the city Parliament found it necessary to make a particular act in favour of the Shfs or they would have been liable —

There is also some diversity to be observed between the consequences of a voluntary & negligent escape.

It was formerly holden that in cases of a voluntary escape on final process, the party escaping was absolutely discharged from all liability & the liability entirely transferred to the Shf. But this is not law. The Plf. may in such case have if he pleases a new action against the party escaping or by scire facias have a new execution against him. On scire facias, however, he cannot arrest the party, but can obtain upon it a new execution upon the old judgment.

Hob. 60. 202.
1 Sid. 330 –
1 Vent. 4. 269.
2 Mod. 136.

And now by stat. 8 & 9 Wm. & Mary a new execution may issue without

1 Bac. 196.
2 Bac. 241.
3 B. 415.
Cro Eliz. 555.
Bul. N.P. 69

(Sheriffs & Gaolers)

without scire facias or it seems plff may retake the escaper on the original execution. This latter he may do at common law as it is now understood.

5 Co. 52b. 2 Wils. 298. 1 Esp. Dig. 611. And if a person committed on mesne process is permitted to escape the plff. may retake him on an escape warrant.

But in case of a voluntary escape neither the shf. nor gaoler who suffers it, can retake the person escaping nor have any action against him.

3 B.C. 415. 3 Co. 52. 1 Sid. 330. 7 T.R. 176. 1 Vent. 269. Because they are particeps criminis — But the plff. is not to be ousted of his original right, by the misconduct of the officer. And if the officer permitting the escape does retake the escaper, the former is guilty of false imprisonment —

(Lecture 5)

The Sheriff or other officer in permitting any voluntary escape is guilty of a violation of law, it is a crime —

10 Co. 100 b. 2 Bulst. 212. Hence a bond to save a Sheriff harmless against a voluntary escape is void as being against law. The reason is obvious — The object & effect of the bond is an escape — a breach of law —

1 B.C. 69 — Esp. Dig. 611. The plff in the process may retake the deft.

Sheriffs
Gaolers.

Deft. escaping in a voluntary escape & commits him even if he has recovered agt. the Shf. or gaoler, provided the sum so recovered against the Shf. or gaoler is less than the debt & cost with which the escaper is charged in Execution.

But in the case of a negligent escape, the Shf. or officer from whom the escape is made may retake the escaper or he may maintain an action on the case against him for the purpose of indemnifying him on his liability to the Plf. The Shf. in this case has a right of action immediately against the escaper, & is not necessitated to wait till sued by Plf. in the Process.

Cro. Eliz. 53. 234.
3 Co. 52 b
Esp. Dig. 612
613.
1 Bac. 45. 46.

And if the Shf. has taken a bond to indemnify him against the negligent escape, it is good.

But tho' the Shf. is entitled to an action on the case against the party escaping in a negligent escape, yet the Shf's bailiff can maintain no such action. — The reason is that the under-shf. or bailiff, being not known as a public officer, & not being liable over to the Plf. who employs him, he can of course have no right of action.

1 Root. 151.
Esp. Dig.
613.
Cro. Eliz.
349.

heriffs &
aolers

tion against, the escaper. —— The under-Shf. is however, liable to the Shf. but this liability arises out of a contract express or implied between the Shf & under-Shf.

But this, I apprehend, is not the case in Con. The D. S. Shf. is here known as a public officer, every thing is done in his own name & he is liable over to the Plf. in the process, therefore there is the same foundation for the Deputy's recovering against the escaper, as there is in England for the Shf's recovering in the same case. It has been determined here, that if a person arrested in one State escape to another, he may be there retaken on an escape warrant.

But the escape-warrant can confer no such authority — it is only evidence of such authority. Tho' it is the usual practice to retake the party in such case upon escape-warrant. —

7 Johnson's Rep.
Ingersoll's Nicholls.
3. Day, 485.

It has been settled by the Supreme Court in New York & by Court of Errors in Con. that the bail or person deputed by him for that purpose may take the principal in another State or at any time & in any place, the right of bail to arrest & confine the person of his principal being transitory.

I observed & it is unquestionably the case that, an escape-warrant confers no authority to retake a person who escaped from arrest into an adjoining state, the right to retake is without the warrant.

Sheriffs & Gaolers

A person escaping from arrest under criminal process, is by the act, guilty of a misdemeanor at Common Law & subjects him to fine & imprisonment & if he breaks prison in case of commitment on criminal process, & escapes he is at Common Law guilty of felony.

2 Hawk. P.C. 122-128
4 B.C. 129

If an officer after having made an arrest of a felon suffers a negligent escape, he is guilty of a misdemeanor only & punishable by fine. And if he permits a voluntary escape he is punishable as the felon himself is. He is considered as accessory after the fact, & is guilty of the same crime as accessory with the party as principal. But in this case the officer, who is guilty of a voluntary escape on commitment for felony, cannot be punished as guilty of the same crime with the felon until the felon, party escaping, be sentenced. Yet the officer so permitting the escape may be prosecuted & punished for a misdemeanor, before the sentence of the felon

1 B.C. 130.
1 Hawk. P.C. 590
2 Hawk. 134

1 B.C. 130

Sheriffs & Gaolers

felon escape — as if he should never return —

But, it is necessary that the Principal should be sentenced before the accessory can be convicted & punished.

If in case of a negligent escape the Shf. has been compelled to pay the debt for which the escaper was liable, the Shf. may undoubtedly maintain an action of indebitatus assumpsit against the escaper for money paid laid out &c to his use —

Esp. Dig. 612
Peak. Rep. 146.

It has been twice decided at Nisi Prius that where a Deputy permitted even a voluntary escape, the Shf. might have this action against the escaper. In a case however later than this it has been decided the action would not lie. —

The only objection to the Shf's recovery, if the Dep. permitted a voluntary escape, is that he is particeps criminis. But if it is the act of the Dept. why shall not Shf. maintain the action because qui facit per alium, facit per se, the act of the Dep. is the act of the Shf. But in view of the Criminal Law the act of the Dep. shall not be considered as the act of the Shf.

I can —

Sheriffs Gaolers

I cannot see, therefore, why the Shf. should not maintain the action against the escaper in this case. But, the decision is contrary.

If after a negligent escape the shf. retake the escaper before action brought against him the shf. his liability to the plf. in the process is discharged. At common-law, however, when the shf. relies upon this defence i.e. recaption, he must plead it specially. It cannot be given in evidence under the general issue.

Stra. 908.
3 Co. 44. 52.
1 Vent. 211. 217.
2 T.R. 126.
1 Roll. 106.

But if, the plf. in the process bring his action against the shf before the recaption, a subsequent recaption will be no discharge of the action. After action brought, the plf. has attached to himself a right of action which no subsequent act of shf. can defeat.

Cro. Eliz. 657.
Stra. 873.
Cro. Jac. 657.
3 Co. 44. 52.

As a recaption by the shf before action brought against him, in case of a negligent escape discharges his liability to the plf. in process, so also does a voluntary return of the prisoner before action

2 T.R. 126.
1 BLP. 413.
Com. Rep. 554.

Sheriffs & Gaolers

tion brought. This voluntary return is equivalent to a recaption?

But in case of a voluntary escape a retaking by the Shf before action brought against him is no discharge of his liability, nor is a voluntary return of the escaper — tho' the officer has no right to retake him any more than he has any other person.

3 J. 52. 6.
2 Wils. 294.
Esp. Dig. 611
612

The right of action against the Shf. is complete the moment the voluntary escape takes place —

Salk. 271 —
612

Nor will a subsequent consent by plff in the process being a voluntary escape i.e. will not discharge the Shf. but plf. may notwithstanding bring his action against the Shf.

On the other hand in case of a negligent escape, the Shf. may retake the prisoner even after action brought against himself — the commencement of such an action not discharging the prisoner escaper. But the Shf. being guilty of no crime there is no impediment to his retaking the escaper.

Cro. Eliz. 404
1 Mod. 194
3 Mod. 225.
336 —

It has been determined in England that the Shf. has no right to discharge a prisoner committed on execution even upon payment of the contents of the execution to him self, & if he does shall be liable for a voluntary escape. The principle of this case is that after the party is committed on execution the Shff. as collecting officer has no more power — his office in that respect is at an end. He has now no more right to receive the money than any other persons. He is not Pltfs attorney.)

Sheriffs & Gaolers

I have already observed that after a negligent escape the Shf. may retake the escaper. — But if after a negligent escape, the plf in the process discharge the escaper, the Shf. or gaoler cannot retake him even for their own fees. But if the execution against the prisoner is discharged while he is in custody, the Shf. or gaoler may retain him for his fees. I suppose the principle is that after the prisoner is out of possession the officer's lien upon him is gone — As a party voluntarily delivering up a pledge shall lose his lien upon it, so shall he also when he parts with it by his own neglect, and as

Sheriff's Powers as between the officer & escapee it is the same as if the escape were voluntary.—

Stat 908. Esp. Dig. 511. If the prisoner is discharged while in custody he may be retained by the Shf. for his fees.

On a negligent escape by a prisoner having liberty of the prison yard, a retaking, or a voluntary return of the escapee, before action brought against the Shf. discharges the Shf. from his liability to the Plf. in the process. 1 Root. 105.. 127. But the Shf. may notwithstanding maintain an action* on the bond of indemnity because expressly conditioned against such an event. But tho' the Shf. may maintain this action, yet he will in such cases generally recover nominal damages only.— 1 Root. 151.

If after a negligent escape from Shf. or gaoler, the claim of the Plf. against the Shf. officer is barred by the statute of limitations, the Shf. can recover no damages against the bondsmen — they will be merely nominal ——

Under a count or declaration

tion for a voluntary escape, the Plf. may give in evidence a negligent one & this will support the declaration. It follows then, that tho' the Plf. counts upon a voluntary escape, the Shf. may plead a retaking upon fresh suit without traversing the allegation that the escape was voluntary & the plea is good. — Sheriffs & Gaolers

If Shf. pleads a recaption on fresh suit & the Plf intends to go on for the voluntary escape he must make a novel assignment, a particular statement of voluntary escape as relying upon that & this puts the Deft. upon his justification of the voluntary escape. — 1 Vent. 217. 2 T.R. 126. 1 Vent. 211.

9 If the Plf sues the under officers in case of a voluntary escape, the Shf. is discharged. I find no authority for this except the dictum of Espinasse & I do not in general take his dicta as law, but the rule appears a reasonable one and should I think be considered as law. Because the Shf. by the action against might be lulled into security till he loses the means of indemnity. — Esp. Dig. 612.

10 If, after an action is brought

Sheriffs
Att.
Escapes

8 Co. 142 b.
Hob. 209.
3 Mod. 325.

brought against the Shf. for an escape on final process judgment, & before plea pleaded the original judgment against the escaper is reversed, the Shf may discharge himself from liability in the action by pleading nul tiel record — As the original judgment is reversed no such record can be shown —

But if after plea pleaded or rather judgment against the Shf, the original judgment against the escaper is reversed, the judgment against the Shf. stands good. As impossible for Shf. to take any advantage of the reversal of the original judgment, it is too late.

According to the modern practice an alteration of the plea is required allowing & probably ought to be in the case of a reversal of such original judgment after plea pleaded & before judgment in suit vs the Shf. — So that the terms of the rule "after & before plea pleaded" would more properly now be altered to "judgment, rendered"

8 Co. 143 b.

But it would seem very unreasonable that the judgment should remain good, when the original judgment is reversed. I do not know what is meant by the judgments standing good: I think there is no doubt the shf. may have a remedy by an audita querela, & such I understand to be the sense of the common law in the case in which the rule is laid down. —

Sheriffs & Jailers

Lecture 6

A few remaining rules of the common law on this Title. —

1 Wils 336.
Esp. Dig. 615.

If a shf. or other officer make a false return, he is liable to an action of trespass on the case in favour of the party aggrieved by the falsity of the return.

Suppose a shf. returns he has made service when he has made none, the Deft. is in this case the party aggrieved — the Pff. is not injured thereby, & the return is conclusive against the Deft. he cannot falsify the return in his plea — Therefore plf. in such action, at common law can have no action for false return, but Deft. is entitled to it.

But in Con. the Deft. may falsify the return by his plea & where therefore, the plff. may suffer & of course he may maintain the action for false return against the shf.

Sheriffs & Gaolers — sheriff — But if the Shff. make the return of non est inventus, the Deft. cannot maintain the action false return, because he is not aggrieved — the Plff. is the party injured and he shall have the action —

Cro. Eliz. 729.
1 Stra. 650.
Esp. Dig. 616.

Certain Statute Provisions of the State of Connecticut.

Plow. 68. 1 Mod. 132. 12 Mod. 683. — I would here premise, however, that all persons at Common Law, except felons attainted are bound to support themselves — when prisoners —

Stat. Con. 365. 223. — Our Statute provides on this subject that persons committed to prison for any offence are to bear their own charges as well as the expense of commitment, if they are able & their estate is chargeable therewith. & for want of estate they may be disposed of in service to answer the same. Accord to usage.

But these expenses are regularly paid in the first instance out of some public treasury as from Town or County —

The gaoler who furnishes food &c to the prisoner must be paid from public treasury as by county or State & they have their remedy against the prisoner.

Stat. Con. 365. — Our Statute also provides that if a gaoler receives from any Prisoner greater fees than what is allowed by law he is liable to pay treble damages to the party grieved & subject to be fined by the County Court. Sheriffs & Gaolers

When a person is committed in a civil case he is obliged to bear his own expenses unless he is admitted to the poor prisoner's oath, which amounts to this, that he has no estate to the amount of $.17. nor sufficient to pay the debt on which he is committed. — He also swears he has not fraudulently disposed of his Property — 1 Root. 117.

On being admitted to this oath the prisoner is discharged unless the Plff pays his weekly maintenance. If the plff. chooses to continue the prisoner in prison, he must lodge a certain sum with the gaoler for his weekly maintenance —

Tho' the prisoner's body is thus discharged upon taking this oath any Property which he may afterwards acquire is liable to this debt. 1 Root. 58. The only effect of this oath then is to discharge the body of the prisoner.

Before this oath is administered the creditor

Sheriffs & Gaolers

creditor must be notified to appear & shew cause why it should not be administered. And he must have four days notice.

This oath may be administered by any justice of the Peace or magistrate.

Stat. Con. 365.

If when it appears that the prisoner has property &c which prevents him from being entitled to the oath, he can on subsequent application only, either to the Chief Justice of the Common Pleas & a justice of the Peace, or to two Justices one of whom is of the quorum. If the oath is administered in the first instance, the creditor may have a rehearing on his part either before the Chief Justice of the Common Pleas & a justice of the Peace or before two justices of the Peace, one of whom is of the quorum.

But, this oath having been administered, the creditor wishing to detain the Debtor as prisoner must for that purpose lodge in the hands of the gaoler his (Debtor's) weekly maintenance this finally comes from the prisoner, & he cannot afterwards procure his enlargement without paying this expense with the debt.

Sheriffs
Gaolers

When any county is destitute of a gaol, every person liable to be imprisoned may by lawful authority be imprisoned in any adjoining county —

Our County Courts in their respective Counties in this state have authority to order into close confinement all persons imprisoned by virtue of an execution for debt, damage, fine or cost, except the judgment on which such execution issued, was rendered in the Superior Court, in which case that Court has the same authority. And the Shff. or gaoler is bound to obey the order of the Court in this case, otherwise he is guilty of a voluntary escape.

As a Gaoler may admit a prisoner to the liberty of the prison yard, yet County Court may order that prisoner within the walls except he is in on execution from Superior Court, in which case that Court may do the same, and if the Shff. or gaoler does not obey this order & continues the prisoner without

out

Sheriffs
Gaolers
#3

without the walls, he is guilty of a voluntary escape.

This authority in the two cases does not extend to any a case when the prisoner is confined for a sum not exceeding seventeen dollars. ( )

1 Root. 450.
Stat. Con. 367. 368.

In Con. if a prisoner escapes thro' the insufficiency of the gaol the county & not the Shf. is liable. In England the Shf. is liable, because the Shf. is the officer to build & repair the gaol. Here it is the duty of the county to build & repair gaols.

Kirby 318.
1 Root. 158. 275. 278. 357. 450. 505.
2 Root. 30.

The remedy here against the county is by petition to the Court of Common Pleas, not by action at law. As the County Court are always judges of the County against which the action is brought & of course residents of the same county, the party is allowed to appeal to the Superior Court, as they are not so likely to be affected by local interest.

1 Root. 125. 155. 278. 357. 505.
Kirby 318.

In general the liability of the County is nominal. For it has been determined that if the debtor is responsible the county ought not to be holden, because the creditor may proceed & recover his debt against the

Sheriffs & Jailers

debtor escaping. And if he is not responsible the party loses nothing thereby, so that in either case the damages recoverable of the county are made nominal merely. But there is one class of cases in which the county is entirely holden. — When the party escaping is of ability to pay the debt, but by his escaping the creditor loses the means of recovering it, the county in this case are liable for the payment of the debt.

Miscellaneous Rules of Common Law.

If a creditor voluntarily discharges from custody a debtor taken on execution, whether committed or not, the execution & judgment are discharged forever — He can never afterwards take him thereon. The reason is that the body of the debtor is deemed a satisfaction of the debt & it is always a satisfaction as long as it is in custody. & a delivery up of the body is therefore a discharge of the Execution & judgment,

Stra. 653.
7 T.R. 420.
1 T.R. 557.
6 T.R. 525.
8 T.R. 123.

Sheriffs & Gaolers

judgment. And tho' the Plf. dis-
charges the prisoner from custody in considera-
tion of a new promise from the
prisoner to pay the debt & this prom-
ise is not performed; the rule is
4 Burr. 2480. 1. T. R. 557. 6. T. R. 525. 7. T. R. 420. 2 East 243. the same — The execution of judgment
are forever discharged. His only
remedy is upon the new promise.
And so far has the rule been
extended carried, that, in cases of this kind,
if the new contract into which the
prisoner enters cannot be enforced
1. T. R. 557. 6. T. R. 525 — thro' informality, the rule is the same
and the creditor's remedy is en-
tirely gone. And still farther
— if the prisoner on being discharg-
ed executes a bond to the Plf. con-
ditioned for rendering himself
up again in execution, the bond
is void as against law, and if the
Plf should afterwards retake &
commit him, he is guilty of false
imprisonment. The condition
is void as the retaking is false im-
prisonment & of course against
law — no man can bind him
1. B&P 242. self to be imprisoned against
law.

If two joint debtors are taken
in Ex-

Sheriffs & Gaolers

in execution, a release of the body of one of them by the plf. is a release of the whole debt & of course the other must be discharged. It is a release of the whole debt because each one is liable for the whole debt — each owes the whole debt. And I suppose it can make no difference if the original liability was joint & several or not. The judgment debt is joint — there is nothing several in the judgment.

1. Lutw. 93.
Salk. 574.
Ld. R. 690.
Cro. Car. 551

But under the law merchant, if the holder of a bill of exchange or promissory note, after having taken one indorser, has discharged him from prison, he may sue the other indorser & commit him, or drawer.

2 B. R. 1235.
4 T. R. 825
2 Show. 481.
Chitty on Bills
124. 181. 182.
155

It was formerly decided that if a sole deft. confined on execution died in prison, the debt was forever extinguished, & this on the ground that the plt. had elected his highest remedy & ought to be bound by the consequence.

Hob. 52.

But the statute 21. James I was

made

Sheriffs & Gaolers

made upon this declaring explaining & enacting that the Plff. in such case may sue out another execution against the estate of the deceased.

2 Burr. 354.
Cro. Eliz. 850.
Cro. Jac. 136
140. Keily. 183.

And if one of two joint debtors died, that debt as to the other is not discharged. It was always so holden independent of the statute just mentioned.

5 Co. 86.
Cro. Eliz. 850.
Cro. Jac. 136. 143.

In construction of the statute 23 Henry 6. called the statute of ease & favour, a bond by the prisoner to the Shff. conditioned that the obligor will remain a true prisoner till the debt, fees, & expense of board are paid is void wholly.

10 Co. 100. b.
Plow. 68.
1 Pow. Con. 175.
Hob. 14.
2 Wils. 351.

A bond conditioned that the party should remain a true prisoner would be good; yet this being joined with what is prohibited by the statute, the whole bond is vitiated.

* * *

Litchfield Conn. August 1. 1812.

F1417
3,5[illegible]
UCEX/BRC

REEVE &
GOULD'S
LECTURES